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Editor's notes

The last four CALC conferences have been extremely successful, with ever increasing numbers of CALC members attending. Over 150 members and their guests attended CALC 2009 in Hong Kong. The next CALC conference will be held in Hyderabad, the capital of the Indian State of Andhra Pradesh, from 2 to 7 February 2011. We hope to see even more CALC members there than ever.

Here is a bit about Hyderabad. With a population of over 4 million, Hyderabad is the capital and the most populous city of the Indian state of Andhra Pradesh. The city is well-known for its rich history, culture and architecture. Hyderabad is also known as the *City of Pearls* and the *City of Nizams*. It is a blend of traditionality and modernity.

In recent years, the city has emerged as a modern hub of the information and biotechnology industries as well as becoming a popular conference venue. It is not only home to the world's largest film studio, the Ramoji Film City, but also has the second largest film industry in the country (the Telugu Film Industry, which is popularly known popularly as Tollywood).

Hyderabad is located about 500 metres above sea level. It has a wet and dry climate with hot summers from late February to early June. The monsoon season is from late June to early October. The winter from late October to early February is very pleasant.

Hindus form a majority in the city. Muslims constitute about 40% of the population, making Hyderabad's Muslim population the largest in Andhra Pradesh.

Telugu, the official language, and Urdu are the principal languages spoken in the city. English has a strong presence among the educated people.

The City has evolved into a cosmopolitan society due to the presence of the information technology industry. It nevertheless retains its ancient culture and traditions. Historically, Hyderabad has been the city where distinct cultural and linguistic traditions of North India and South India meet. *Hyderabadis*, as residents of the city are known, have developed a distinctive culture which is a mixture of Hindu and Muslim traditions.

Hyderabadi cuisine is a blend of Mughal and Persian cuisine. Hyderabadi Biryani (pictured left) is an iconic dish of the region. Other native preparations include Qubani ka meetha, Double ka meetha, Phirni, Nahari Kulche also known as *paya* and Haleem (a meat dish traditionally eaten during the holy month of Ramazan), Kaddu Ki Kheer (a sweet porridge made with sweet gourd), Sheer Qorma (a sweet liquid dish cooked with vermicelli and milk), Mirchi ka saalan, Bagaare baigan, Khatti dal, Khichdi and Khatta, Til ki chutney, baigan ki chutney, Til ka khatta, Aam ka achaar, Gosht ka achaar, Peosi (a sweet prepared with egg whites and milk), Shahi tukde, Kheema aaloo . Indian desserts are known for their ghee-based items.

Widely found on street-corners are Irani cafés that offer *Irani chai*, *Irani samosa* and *Osmania biscuit*. Italian, Mexican, Chinese and Continental cuisine are all popular in the city along with typical Andhra and other South Indian cuisine. The city also has some of the best pubs in South Asia and "trance music".[1]

Hyderabad has a number of four and five star hotels. It also has several budget hotels, especially in the old business areas. These budget hotels not only provide convenient access to the main railway stations of Kacheguda and Nampally they also provide easy access to nearby shops. They are particularly suitable for travellers with a tight budget.

To ensure a successful and enjoyable conference in Hyderabad, the CALC Council has formed an organizing committee comprising 7 Council members together with the President, Secretary and Treasurer. More details will be included in the CALC Newsletter. If, in the meantime, you have any ideas about the content of the conference or its organisation, the Council would be delighted to hear from you.

The Makkah Masjid in Hyderabad. The structure was built during the reign of Sultan Muhammed Qutub Shah, the 6th Qutub Shahi Sultan of Hyderabad. The work began in 1617 and was finally completed 77 years later during the reign of the Mughal Emperor Aurangzeb. The main hall of the granite is big enough to accommodate 10,000 worshipers at a time. Fifteen arches support the roof of the main hall. More than 8,000 workers were employed to build the masjid.

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[1] Trance is a style of electronic music that developed in the 1990s. Trance music is generally characterized by a tempo of between 130 and 155 beats per minute, short melodic synthesizer phrases, and a musical genre that builds up and down throughout a track. the name is undoubtedly linked to the perceived ability of music to induce an altered state of consciousness known as a trance. The effect of some trance music has been likened to the trance-inducing music created by ancient shamanists during long periods of drumming.

Access to Legislation—the Legislative Counsel's Role[1]

Daniel Greenberg[2]

Abstract: *Making legislation clear and easily accessible to the reader has always been a high priority for legislative counsel. As legislation increases in volume and complexity, it becomes increasingly important to do what we can to help citizens to navigate around it and to understand it. The courts are increasingly inclined to demand high standards of accessibility in all senses, and to make them a condition of validity wherever due process is a legal requirement. This is a challenge for governments, and legislative counsel have a distinct contribution to make in meeting it. We can and should constantly explore new ways of making the law easily accessible to citizens.*

1. Putting the reader first

The issue of access to law has always been of importance to legislative counsel. One sometimes hears the notion that older drafting standards revolved around "conventional verbose drafting" or the "slavish use of precedents". But these were never good drafting practice. The great legislative counsel of former years—Sir Courtenay Ilbert, Sir Alison Russell and so on—all lay great stress in their writings on the fundamental importance of clarity and simplicity.

Of course, some things have changed. An examination of popular English literature over the last century or two shows that, for example, there has been considerable change in the tolerance for

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1 This article is based on a talk given at the 2009 Conference of the Commonwealth Association of Law Counsel in Hong Kong. It has benefited from the scrutiny of Saira Salimi and Jennifer Cartwright, both of the Office of the Parliamentary Counsel (United Kingdom).

2 Parliamentary Counsel (United Kingdom)

sentence lengths in the vernacular. Good modern practice in legislative drafting stresses the importance of keeping sentences short. As a result, average sentence length in well-drafted legislation has diminished. But that reflects a general change in English usage, and does not provide evidence that the standard legislative drafting of 50 years ago used sentences that were of unacceptable length, judged by the literary standards of their day, however unacceptable they might be today.

It is also true that legislative counsel have never confused, as some people still do, the concepts of accessibility, clarity and simplicity with the notion of brevity. Lord Renton, an outspoken critic of poor legislative drafting, included the following observation in his Report of 1975[3]—

> "On the other hand, the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain."

2. New pressures

So the idea of putting the reader first in constructing legislation is not a new idea; but political and technological developments can give it a new flavour. In particular, there are new pressures on accessibility of legislation that require to be considered.

The higher courts have always regarded it as one of their responsibilities to guard citizens from interference with their liberties. One of the ways in which they have pursued this responsibility is to operate a number of presumptions against the legislature and the Executive, in construing legislation, so that express words or clear implication are required to legislate in a way that imposes constraints on the citizens' freedom of action[4].

The more the pressure on citizens grows as the result of the increasing size and complexity of the statute book, the more determined the courts are to play their part in protecting the citizen. Some people, both inside and outside the legal community, cite the maxim "ignorance of the law is no defence" as though it amounted to a presumption that citizens are aware of all law that concerns them, and as though it implied that it is irrelevant to the lawfulness of legislation whether the citizen is able to discover what it is and requires.

The falsehood of the first part of that proposition was demonstrated by Lord Mansfield as long ago as 1774; and for a relatively modern discussion of the limitations and nature of the *ignorantia* doctrine see the judgment of Goddard LJ in *Bowmaker v Tabor* [1941] 2 KB 1. In essence, the doctrine is not and never has been a presumption of knowledge—rather, it amounts to an assertion that knowledge of the law is not necessarily a pre-requisite of liability for failing to comply with it. The occasions on which, and extent to which, knowledge is required are addressed by the legislature and the courts in different ways in different contexts: so, at one

3 *The Preparation of Legislation*, May 1975, Cmnd. 6053, para. 11.5.

4 See *Craies on Legislation*, 9th Edn. 2008, Chapter 19.

extreme, an offence may be one of strict liability—in the sense that not only is it unnecessary to prove that the defendant knew of the existence of the offence but it is even unnecessary to prove that the defendant had any intent in respect of the matters of which the offence consists —but the courts will presume that strict liability is intended only if the legislature indicates that intention by express words or clear implication.

As to the second part of the proposition, it is not impossible that accessibility may sometimes be relevant to the lawfulness of legislation, and it seems that the class of cases, and the number of ways, in which it may be relevant, may be growing significantly.

The broad question of the accessibility of legislation covers a range of issues. At one extreme, the most fundamental requirement of accessibility is that an accurate and authoritative text of a piece of legislation should be readily available to each citizen whose affairs it concerns or may concern. The case of *ZL & VL v Home Secretary and Lord Chancellor's Department* [2003] EWCA Civ 25 concerned a purported certification of an asylum claim as unfounded, in reliance on a provision of the *Nationality, Immigration and Asylum Act 2002* that had not been printed at the time when the certification was purported to be made. The Court of Appeal dismissed the challenge on the grounds of lack of publication: but the terms on which they did so, and the nature of the discussion, may be more significant in the long-term than the decision itself, for reasons discussed further below.

3. The concept of valid law

United Kingdom lawyers are used to taking, as the beginning of their approach to legislation, principles learned early in university or law school that more or less equate the principle of Parliamentary sovereignty with the notion that Parliament can do no wrong. In most jurisdictions that is not, of course, the foundation for legislation, the lawfulness or validity of which requires to be tested against its constitutional underpinnings. In the contexts of the law of the European Communities and of the European Convention on Human Rights, too, there is no presumption of lawfulness of legislation just because a legislature—whether primary or delegate—has purported to make it; and it is from these two contexts that the notion of testing the lawfulness of laws passed by Parliament has already entered United Kingdom jurisprudence—most notably in the *Factortame* case.

The discussion of the Court of Appeal in *ZL & VL* addresses another aspect or condition of lawfulness which might enter United Kingdom law by the same route: the general concept is that of "sufficiently good law" and the particular aspect of its goodness raised by that case is that of accessibility.

The Court of Appeal touched on the Strasbourg case of *Sunday Times v United Kingdom* (1979-80 2 EHRR 245). That case contains the following discussion of the principle that certain interferences with human rights become justifiable and lawful if, and only if, "prescribed by law"—

> "In the Court's opinion, the following are two of the requirements that flow from the

> expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

From this decision the Court of Appeal distilled what it saw as a rule of the European Court of Human Rights, that it "declines to recognise national laws which are not adequately accessible". It aligned this to the European Communities' jurisprudential principle of legal certainty, as discussed in *Administration des Douanes v Gondrand Frères* [1981] ECR 1931 and elsewhere and also related it to certain principles of American law. Emerging from this discussion is the idea that whenever validity is an issue —whether because the principle of Parliamentary sovereignty is qualified or affected by international obligations of the United Kingdom or because of other considerations arising out of action taken or approved by Parliament itself—accessibility will be a fundamental component of the requirement of legal certainty (see, for example, *Black Clawson Ltd v Papierwerke AG* [1975] AC 591).

4. Aspects of accessibility

The particular issue of accessibility discussed in ZL & VL was that of physical publication or dissemination. But the breadth of the considerations discussed in the Sunday Times case shows that accessibility goes beyond the simple question of whether citizens can obtain a text, and enters into the question of whether they can reasonably be expected to understand the text and its application to their lives once they have obtained it.

It is this that catapults the legislative counsel into the centre of the issue, for with him or her alone rests ultimate responsibility for ensuring that the law is drafted in such a way as to make its effect accessible to all those readers who could reasonably require to understand it. If I am drafting a law about the taxation of contracts for options on derivatives, I can assume that my target audience is specialist accountancy and legal professionals, and so I draft accordingly. If I am drafting a law about carrying weapons in the street, I should assume that my target audience includes every citizen. Again I draft accordingly.

Clarity of the law has always been accepted as a key responsibility of legislative counsel. However, for legislative counsel in the United Kingdom at least, it may be that this is no longer merely a matter of professional pride and standards, but a component of the validity or effectiveness of the product. It may be that a legislative counsel can no longer warrant to the Ministerial client that a draft serves the policy purpose unless confident that a court will consider

it not just accurate but also reasonably transparent.

5. New challenge—new opportunities

If this suggests that the modern age presents a new challenge to legislative counsel, and increases the pressure on them, it is also true that the modern age presents new opportunities which are available to help to meet the new challenges.

Part of the response of the United Kingdom Government to the ZL & VL case was to consider the arrangements for electronic publishing, and aim to accelerate them wherever possible. The Statute Law Database is a relatively recent attempt by the United Kingdom Government to meet its responsibility for making law freely accessible to all citizens. If and when it can be brought fully up to date, it will go a long way towards meeting that responsibility.

There are, however, dangers in assuming that databases are by themselves the answer to accessibility challenges. Merely shovelling vast quantities of data onto a database can actually impede accessibility rather than enhance it. A database containing large quantities of data is in itself an entirely illusory aid to accessibility. Unless there are efficient and effective ways of finding out what is on the database, and how to access the documents that are most likely to be relevant to a person's situation, it serves only to instil in the database owners a false sense of satisfaction that they have made the data accessible, whereas in fact the kind of real accessibility demanded by the Strasbourg jurisprudence remains as far away as ever, or further.

The answer to the problem lies in part in powerful search mechanisms, and effective analytical storage. But that too is only part of the answer. If data is inherently complicated, there is a limit to how much can be done to render it accessible and intelligible by the way in which it is stored and the tools provided for its retrieval.

So once again legislative counsel find themselves at the centre of the question, for only they can address the fundamental question of how to make the raw data (i.e. the law itself) easier for databases to analyse and store, and for users to retrieve and understand.

6. Taxonomic drafting

The solution to that question requires more than a commitment to plain English and clear drafting. It requires an acknowledgment that it is only electronic technology that is going to render the mass of modern legislation reasonably accessible to most users for most purposes, and that the legislative counsel should therefore work with an eye on making the product as easy as possible for the appropriate technology to process.

That proposition represents a radical change in attitude for me. Like many, my original approach on being offered computers to assist the drafting process was a stubborn unwillingness to adapt my behaviour to suit their convenience, based on the principle that they were there to help me rather than the other way around. But I have very gradually come to realise that a symbiotic relationship with electronic communications is the only approach that is in everybody's ultimate

interest, even if it threatens occasionally to constrain the creative freedom of legislative counsel or to challenge long-held notions of propriety or wisdom. While it is still true that legislative counsel should not have to change their behaviour to accommodate what computers cannot do, they ought to consider changing their behaviour in to take the greatest advantage of what computers can do.

For example, one of the frequent cries for help from the poor law-swamped citizen is for some kind of basic statement of the fundamentals, to help him or her to gain a foothold on the slippery slopes. A traditional answer has been that law must be drafted accurately and comprehensively, and that attempts to preface the detail with simple summaries risk vague but terrible perils associated with the courts' unconstrained construction of apparent repetition. That intransigence was, in effect, embedded by the introduction of Explanatory Notes for United Kingdom Bills and Acts: they were a direct response to the demand for clearer law, and they were presented to some extent as an alternative. Although we were prevented from using a number of techniques to aid clarity in the text of legislation itself, the argument went, we could use them all relatively freely in accompanying explanatory material, because its lack of direct legal effect would make risks of misconstruction less troublesome.

But this to some extent misunderstands the needs and demands of the citizen. Explanatory material alongside the text of legislation is of some help. And indeed if it is well produced, it can be of very considerable help. But it is not a substitute for making the text of legislation itself more accessible. The citizen does not want to have to consult background material to understand the law, unless it is unavoidable: what he or she wants is to be able to navigate around, and understand, as much as possible of the actual law by which he or she is bound.

The challenge for today's legislative counsel is to see whether they can do more to make the law itself accessible, in particular by drafting in a way that maximises the usefulness of the electronic processes that will increasingly become the main or only effective portal to the law. Academic writers have already become well-used to writing with an eye on compliance with a settled taxonomy designed to assist the data-modelling processes through which their writings will be published. Provided the taxonomy is well constructed, with sufficient flexibility for adaptation and development, it need not impede clarity of expression or freedom of substantive innovation. The advantages that it presents, however, can be considerable. For one thing, it enables data to be mass-processed in a way that delivers useful navigational and analytical tools that rely on the predictable and consistent use of standard forms and components.

7. New techniques for new times

By challenging some of the old assumptions, legislative counsel may also be able to do more to help in harnessing the potential of the data-modelling processes underlying electronic databases for improving accessibility of the law.

For example, it is often said that "unnecessary material in legislation has a tendency to go septic". That is an important consideration when it comes to ensuring that aids to navigation do not do

more harm than good, by introducing new uncertainties. But it is only that—a principle to be born in mind. It is not a complete and sufficient objection to the introduction of substantively inert material. Nor is the introduction of inert material as much of a novelty as is sometimes claimed. Headings, parenthetical descriptions and other substantively inert material have been included for decades. Occasionally the courts have regard to them, and occasionally when they do, they arrive at a "wrong" conclusion. But more often than not, their inclusion is not merely harmless but, rather, enormously helpful, saving many hours of research and helping the reader to understand the law quickly and accurately.

In response to the demand mentioned above for authoritative summaries of the law, the introduction of overview clauses as a routine component of legislation is one way in which legislative counsel could signal to readers the determination to help, and to help in a way that would fit extremely well with the requirements of electronic data-modelling. One of the difficulties with which the database designer is faced is that legislation does not divide neatly into many subdivisions, and sometimes the subdivisions that it does present are not obviously those that are the most helpful for the reader. If, for example, the overview clause were to become a sufficiently established and distinct component of legislation to enable databases to include it in the way they handle and arrange data, it could provide a new and valuable navigational technique for readers. Imagine being able to print out, at the touch of a single button, what would amount in effect to a series of single-sentence summaries of the topics and subtopics addressed by a piece of legislation, knowing that each sentence was part of the law itself and was therefore determinative and authoritative in a way that explanatory material, however helpful, of its nature is not.

This is only one example, and it is not necessarily without its disadvantages and will therefore doubtless not be without its opponents. It needs to be discussed from every angle by legislative counsel and others with an interest in drafting. In the same way, every "new" technique, or every increased or altered use of an existing technique, needs to be tested for helpfulness and acceptability both within the legislative drafting profession and among their ultimate audiences. Legislative counsel cannot develop these techniques in isolation, in so far as they are designed to maximise the use of computerised data-modelling and processing. What they need to do is to discuss their processes with those who understand the capabilities of electronic data-storage, so that expertise can be pooled and new ways of, in effect, helping each other can be devised.

8. Conclusion

At this stage, what emerges from the process is less important than that legislative counsel should engage in, and be seen to engage in, the question of how much more they can do as a profession to help their audiences to access their product. Not only the acceptability of legislation, but even its lawfulness, may depend on how much they can achieve.

Whose Law is it?—Accessibility through LENZ:

Opportunities for the New Zealand public to shape the law as it is made

Melanie Bromley[1]

Introduction

There are 2 general questions that we typically think about when we consider the accessibility of our laws:

- how easy is it for people to find the law?; and
- having found it, how easy is it for people to understand?

Each of these questions relates to the law after it has been made. In this paper, however, I focus on public accessibility at an earlier stage: namely, while the law is being created.

Primary legislation drafted in New Zealand often changes significantly after its introduction and before its enactment. Sometimes the resulting Act bears little resemblance to the introductory version of the Bill because of changes made during its passage.

In particular, this paper focuses on how internet technology, and specifically our LENZ system, facilitates public access to information about draft laws as they work their way through the New Zealand parliamentary process.

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[1] Parliamentary Counsel, New Zealand

LENZ

First I must introduce LENZ. The acronym stands for "Legislative Enactments of New Zealand". The LENZ system is the child of the PAL Project (Public Access to Legislation). The PAL Project was successfully completed early in 2008, and use of the LENZ system has now become business as usual in the Parliamentary Counsel Office in Wellington[2]. The LENZ system is an integrated tool set that we use to author, store, publish, and reprint New Zealand legislation.

Parliamentary counsel use an authoring tool (Arbortext Editor) to draft legislation in XML[3] format. When a Bill is introduced, HTML[4] and PDF versions are generated from the XML file and published on the New Zealand legislation website (www.legislation.govt.nz). After a Bill is introduced into the Parliament, successive versions of the Bill are published on that website, complete with revision-tracking mark up that indicates the changes that have been made since the previous published version.

Before discussing in detail the information that can be found on the legislation website, I will first outline the New Zealand legislative process. I will then touch briefly on the theme of this conference.

Overview of the New Zealand legislative process

The diagram shown in the Appendix is an overview of the legislative process, showing the stages at which a new version of a Bill is published on the legislation website.

After its introduction, assuming a Bill follows the standard path through the House of Representatives,[5] there are 2 stages at which it may be amended: the select committee stage and the Committee of the Whole House stage.

After introduction, most Bills will be referred to a parliamentary select committee comprising 10-12 Members of Parliament, from Government and opposition parties. The select committee typically is given 6 months to examine the Bill, hear public submissions, and prepare a report for the House. After hearing submissions, the select committee instructs parliamentary counsel to make changes to the Bill.

At the Committee of the Whole House stage, any Member of Parliament can propose further changes to the Bill. At each of these stages the proposed changes are voted on, and the Bill is republished using mark up that highlights the changes that have been agreed.

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2 References throughout this paper to the Parliamentary Counsel Office are references to the New Zealand Parliamentary Counsel Office.

3 XML (Extensible Mark-up Language) is a mark-up language that uses tags to identify different types of information.

4 HTML (HyperText Markup Language) is a standard language used for creating and publishing documents on the World Wide Web.

5 The New Zealand Parliament consists of a single chamber, the House of Representatives. [Ed]

Before a Bill receives Royal Assent, it will be debated and voted on 3 times in the House: after introduction, after the select committee reports back, and after the Committee of the Whole House reports back.

Theme of this conference: Whose law is it?

I am conscious that a discussion about the opportunities that exist for members of the public to influence the law while it is being made might be seen as something of a 2-edged sword for legislative counsel! Having spent months finely crafting the *Absolutely Perfect Bill* that implements the Government's policy in a clear, precise, logical, and well-structured manner, it can be disconcerting to be asked at the select committee stage to insert new material that does not sit well within the structure, or that has the potential to introduce ambiguity.

It is, of course, a good and natural thing to take pride in our work, and to feel a sense of ownership about it. It is that sense of ownership that motivates us to apply considerable care and attention in its development. And, at least in a general sense, we clearly do have an ownership stake in legislation in our role as "guardians of the statute book". Nonetheless, however much we are prone to feel we own each piece of legislation we draft, reluctantly we must acknowledge that our individual drafting projects do not, in fact, belong to us as parliamentary counsel!

I will proffer my personal view on the question of "Whose law is it?" I consider that the laws that we draft ultimately belong to the people who are governed by those laws. This premise leads to the conclusion that the public not only have a right to access laws after they have been enacted, but also a right to seek to influence the shape of those laws before they impact on their lives.

Feedback received from members of the public can often help to identify areas of ambiguity and other weaknesses in a proposed legislative scheme. Public scrutiny of draft legislation can therefore be regarded as a useful tool for testing its workability.

Internet access to draft legislation, at different stages of the legislative process, provides a mechanism for increasing public awareness of that process. It also has great potential to make it easier for people to take part in the process, by breaking down barriers to participation that might otherwise exist.

Accessibility at different stages in the legislative process

Accessibility at the pre-introduction Stage

At the pre-introduction stage, when policy development takes place and the introduction Bill is drafted, any opportunities for the public to influence the shape of the law are provided by the department that is sponsoring the Bill. In many cases, extensive formal consultation on the policy will be undertaken before drafting instructions are issued to the Parliamentary Counsel Office. In some cases, departments may also release an 'exposure draft' prepared by PCO before a Bill is introduced.

In September 2007, the New Zealand Police broke new ground in public consultation by

launching a drafting wiki (http://www.policeact.govt.nz /wiki). A wiki is a website that allows visitors to add, remove, and edit content. The Policing Act wiki gave to members of the public the ability to contribute their ideas as to how the law relating to policing ought to be reformed by directly editing an on-line version of a proposed new Policing Act. This novel approach to consultation generated international media interest at the time, and the organisers described the response that was received to it as "overwhelming".

I should emphasise that the Policing Act wiki was not an initiative of the Parliamentary Counsel Office. I mention it only because it did generate such intense interest, and because I anticipate that the concept of using a wiki as a means of public consultation at the pre-introduction stage could arise again in future.

Wikis have been described as more of a social revolution than a technical revolution, and their use as a means of internal information sharing is already beginning to be embraced by a number of major law firms.[6] We now live in what many are calling the "information age" and it is inevitable that the attitudes and expectations of an increasingly computer-literate public will lead to many different styles of consultation using the internet. It is entirely possible that we will see more widespread use of wiki-style technology by politicians, departments, and lobby groups, in the legislative drafting arena.[7]

There can be no doubt that the Policing Act wiki was a modern and innovative means of eliciting the views of the public on an item of draft legislation. However, the use of wiki-style technology to consult the public about the wording of draft legislation does raise a number of difficult issues for legislative counsel. Some of those issues include—

(a) a blurring of the important line between policy and drafting—a distinction that is important to legislative counsel, but unlikely to be appreciated by many members of the public;

(b) a risk that the practice may reinforce an approach whereby policy refinement takes place only after there is a draft legislative text on which to comment;

(c) the possibility of losing useful contributions that are overwritten by a later user who takes a different point of view; and

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[6] e.g. Allen & Overy (last accessed at http://www.iwr.co.uk/information-world-review/features/2168470/ blog-standard-approach); Linklaters (last accessed at http://www.thelawyer.com/cgi-bin/item.cgi?id= 127569&d=11&h=24&f=23).

[7] Another recent example of a type of wiki being used to inform legislative drafting is US Senator Dick Durbin's site entitled "Legislation 2.0: Getting our discussion underway" (last accessed at http://openleft.com/showDiary.do;jsessionid=E674D13460DB3712296D603CF8DA62C5?diaryId=363). The Senator seeks on-line participation before drafting legislation relating to broadband access. He says: "I think this is a unique experiment in transparent Government and an opportunity to demonstrate the democratic power of the internet. If we're successful, it could become a model for the way legislation on health care, foreign policy, and education is drafted in the future."

(d) the potential for extensive public debate about the wording of legislation to create "sacred phrases" that then become difficult to alter even if the proposed wording is not ideal.

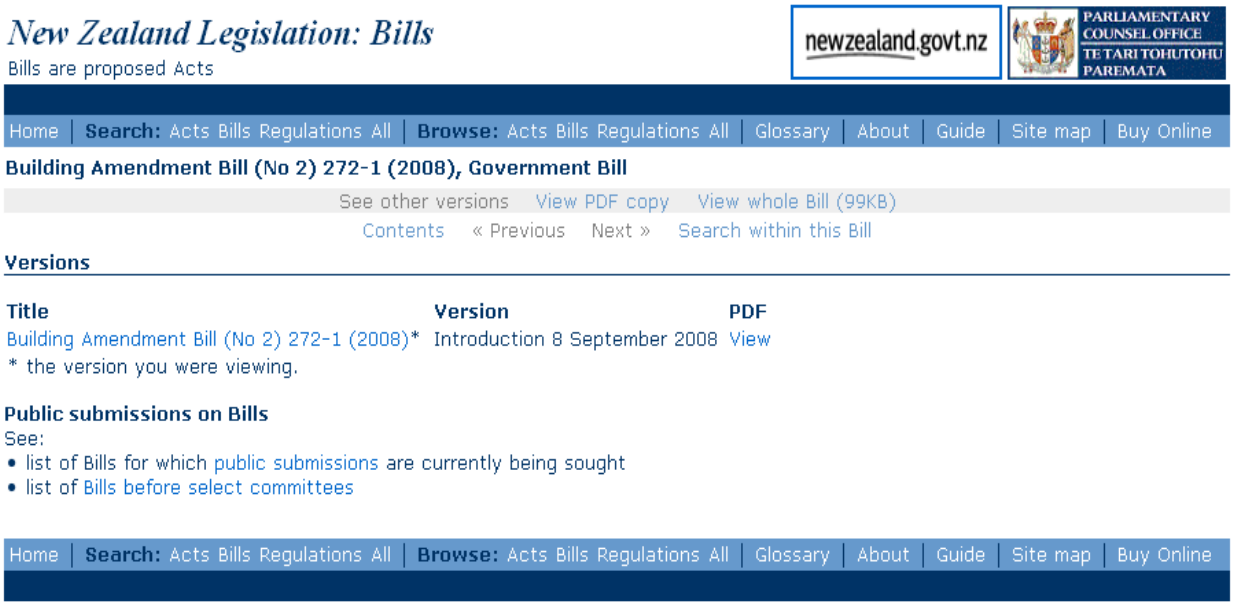
I will not need to convince this audience that drafting legislation is a task that demands specialist skills. I can reassure you that the Policing Act wiki was not intended to replace drafting by parliamentary counsel!

The Policing Bill that was subsequently introduced into Parliament was drafted, in the usual manner, by a team of parliamentary counsel from the Parliamentary Counsel Office. The parliamentary counsel involved did not refer to the wiki site (which, by its very nature, changes from hour to hour) during the course of their drafting. The introduction Bill ultimately bore only a passing resemblance to the wiki Act.

Accessibility at the select committee stage

In addition to being made available in hard copy, all Bills are published on the legislation website overnight on the date that they are introduced. The introduction copy of every Bill includes, at the front, an explanatory note that is designed to explain the policy behind the Bill, and the content of the Bill, in lay terms. The instructing department provides text to explain the general policy of the Bill, and parliamentary counsel writes a "clause by clause" analysis setting out the effect of each provision in the Bill.

On the legislation website, users can search for a particular Bill, or browse through lists of Bills to find what they are looking for. Having found a Bill, users can choose to view other versions of that Bill, and can click on a link to a list of all Bills in relation to which public submissions are currently being sought.



The list of Bills in relation to which submissions are being sought is generated from the New Zealand Parliament website. That website also contains information about the different select committees that exist and helpful advice about how to make submissions.

In 2008, the Select Committee Office ran a pilot project that provided website users with an option to make an online submission to some select committees. An analysis of the submissions received by those committees during the pilot showed that a very high percentage of submissions were made via the website.

Users were given an option to upload a document that they had prepared, or to simply complete a webform. A significant number of people chose to complete the webform, rather than prepare a separate document. It seems reasonable to speculate that at least some of the submitters who completed a webform may not have gone to the effort of preparing and posting a hard-copy submission if that were the only option open to them.

It is intended to roll out the on-line submission system to all select committees in the middle of

2009. This innovation, coupled with the easy access to introduction copies of Bills on the legislation website, undoubtedly makes it easier for the public to find out about, and comment on, the laws that Parliament[8] is proposing before they are enacted.

After receiving public submissions, the select committee discusses what changes (if any) they might recommend be made to the Bill and asks parliamentary counsel to prepare a revised version of the Bill that shows those changes using revision-tracking mark-up. After the proposed changes have been voted on by the committee, it formally reports back to the House by presenting a reprinted version that indicates the recommended changes. It is not unusual for a committee to recommend numerous changes as a result of the submissions that it has heard.

The revision tracking mark-up that is used in the reported back version indicates whether the committee agreed to each change unanimously, or by majority only. The key below illustrates the mark-up that is used in the hard copy reprinted version of a Bill that is reported back from a select committee:

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

text inserted unanimously

~~text deleted by a majority~~

~~text deleted unanimously~~

The screenshot below shows a revision tracked clause as it appears on the legislation website. The caption that indicates whether a change is recommended unanimously or by majority appears when the user hovers the cursor over inserted or struckout text.

[8] I.e. the New Zealand Parliament.

New Zealand Legislation: Bills
Bills are proposed Acts

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Real Estate Agents Bill 185-2 (2007), Government Bill
• enacted

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Bill by clause
Contents › Part 1 Interpretation and application

4 Interpretation

In this Act, unless the context otherwise requires,—

agency agreement means an agreement under which an agent is authorised to undertake real estate agency work for a client in respect of a transaction

agent means a real estate agent ~~licensed~~ who holds, or is deemed to hold, a current licence as an agent under this Act

Authority means the Real Estate Agents Authority established by **section 14**

branch manager means a person who holds, or is deemed to hold, a current licence as a branch manager under this Act

client means the person ~~for whom~~ on whose behalf an agent carries out real estate agency work

company means a company within the meaning of the Companies Act 1993, and includes a building society within the meaning of the Building Societies Act 1965, and a limited partnership registered under the Limited Partnerships Act 2008

inserted (select committee majority)

contractual document, in relation to a transaction, means a document that contains or records an agreement or a proposed agreement to enter into or effect the transaction, and includes a document that contains or records an offer that, on its acceptance, gives rise to such an agreement

commission means remuneration by way of commission, fee, gain, or reward for services provided by an agent ~~under an agency agreement~~ in respect of a transaction

The select committee's report will also contain a commentary section at the front, in which the committee discusses the issues it considered and explains its recommended changes. That commentary will usually contain a separate report from the minority of the committee, if the reprinted Bill recommends changes that were not agreed to unanimously.

The reported back version is published in hard copy and placed on the legislation website on the date on which the committee tables its report in the House. Members of the public can then download a PDF version of the reported back Bill, or view it in HTML format on the website.

At the second reading, Members[9] debate the main principles of the Bill, and any changes recommended by the select committee in its report. Changes that are supported by every committee member are automatically included in the Bill if the second reading is agreed. Changes that were not recommended unanimously are subject to a single vote at the end of the second reading debate. Assuming the second reading is agreed, the Bill then proceeds to be considered by a Committee of the whole House.

[9] I.e. Members of the New Zealand House of Representatives.

Accessibility at the Committee of the Whole House Stage

There is no time limit on the Committee of the whole House debates and controversial Bills may be debated over several days before a vote is called. It might seem that, by this stage, all opportunities for a member of the public to influence the legislation have passed. However, any Member of Parliament can participate when a Committee of the Whole House debates a Bill, and can propose changes to that Bill. Therefore the key to seeking a change at this stage is to identify the right Member, or political party, and to lobby them in an effective manner.

Changes to a Bill at the Committee of the Whole House stage are proposed in 2 ways:

- by preparing, in advance, a supplementary order paper (SOP) describing the desired changes in narrative form; or
- by lodging a 'table amendment' during the debate.

Supplementary Order Papers are published on the legislation website, but table amendments, which are less formal documents, are not. Parliamentary counsel draft SOPs that are supported by the Government, whereas a member of the Office of the Clerk drafts SOPs on behalf of opposition Members.

Supplementary Order Papers are found on the New Zealand legislation website on the same page that lists the different published versions of a Bill:

New Zealand Legislation: Bills

Bills are proposed Acts

newzealand.govt.nz

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Real Estate Agents Bill 185-2 (2007), Government Bill

- enacted

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Versions

Title	Version	PDF
Real Estate Agents Bill 185-2 (2007)*	Reported from the Justice and Electoral Committee on 29 May 2008	View
Real Estate Agents Bill 185-1 (2007)	Introduction 3 December 2007	View

* the version you were viewing.

Acts from this Bill:

- Real Estate Agents Act 2008 No 66, Public Act

Related Supplementary Order Papers:

- Supplementary Order Paper No 243 (released 02 September 2008)

Public submissions on Bills

See:

- list of Bills for which public submissions are currently being sought
- list of Bills before select committees

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Reviewing the information that can be gleaned from the select committee's reported back version could be a useful tool when seeking to identify a Member of Parliament who may be willing to propose a particular change. The commentary at the front of the reported back version will indicate which political parties did not agree to the changes that were recommended only by a majority of the select committee.

The move in New Zealand from a 'first past the post' electoral system to a proportional representation system has resulted in recent New Zealand governments being formed by coalitions of different parties. This phenomenon can also be seen as enhancing the opportunities for a member of the public to successfully lobby for change at the Committee of the Whole House stage of the legislative process. It is not unheard of for parliamentary counsel to be asked to draft a Government SOP that makes reasonably significant changes to a Bill as a result of demands from a minor coalition party in exchange for its support.

All of the changes proposed by members at the Committee of the Whole House stage are voted on. When the final form of the Bill is established, in most cases, it will again be reprinted showing the changes that have been agreed. That reprinted version of the Bill, complete with revision-tracking mark-up, will again be published in hard copy and on the legislation website.

Conclusions

The ability of individual members of the public to seek to influence the shape of the law by making submissions at the select committee stage, or by lobbying Members of Parliament, is not new in New Zealand. However, internet access to legislation at various stages of the legislative process provides a new mechanism for increasing public awareness of that process. It also has significant potential to make it much easier for people to participate in the process.

The use of internet technology is fast becoming a major part of people's lives. The World Internet Project New Zealand[10] found that 78 per cent of New Zealanders use the Internet, indicating that this is a medium that reaches a majority of the New Zealand population. Those that do not use the Internet tend to be older people, which suggests that this percentage will only increase over time. Internet access removes barriers (for example, geographic, physical, and economic barriers) that may otherwise prevent people from seeking to take part in the legislative process.

If we embrace, or even just accept, the notion that the law belongs to the people that are governed by it, then any initiative that enhances opportunities for the public to have their say about a proposed law before it is enacted must be a good thing. I am happy to say that the legislation website that forms part of our new LENZ system does just that.

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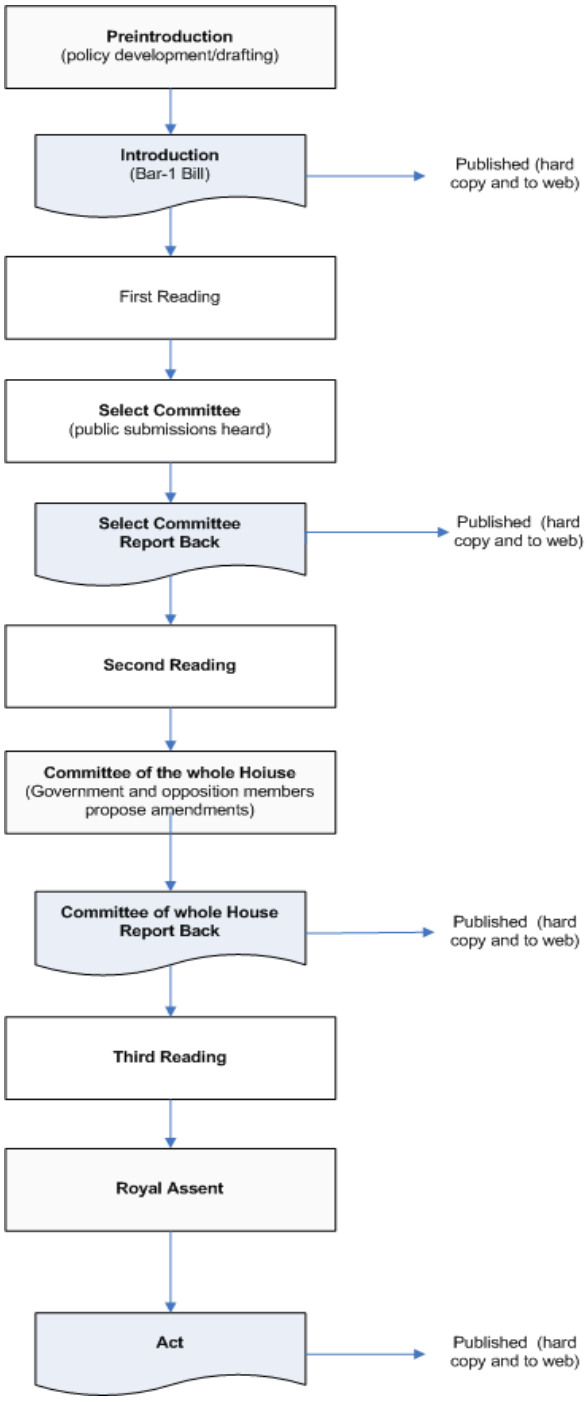
[10] Last accessed at www.wipnz.aut.zc.nz.

APPENDIX— OVERVIEW OF THE NEW ZEALAND LEGISLATIVE PROCESS



Consistency versus Innovation[1]

Stephen Laws[2]

Introduction

The purpose for which the United Kingdom Office of the Parliamentary Counsel (the OPC) was set up in 1869 was to produce—

> "a common and consistent approach to the production of legislation".

On the other hand, there is also a strong habit of mind in the OPC of professional independence, supporting creativity and innovation. And this has been one of its traditional strengths.

Parliamentary counsel live in the middle of change and everything they do changes the context in which Bills are drafted. Everything that is drafted is necessarily new and an over formalised approach is likely to involve a failure to adapt to the changing conditions that are produced by legislation itself. Creativity and innovation are essential requirements of the job and need, within the structure of a corporate endeavour, to be encouraged and fostered. There is a tension; and, inevitably, a balance has to be struck.

Consistency

"Consistency" was a major part of our raison d'être and remains so today. What is the value of consistency for drafting legislation?

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[1] Paper delivered at the CALC conference held in Hong Kong in April 2009.

[2] **F**irst Parliamentary Counsel, United Kingdom

It increases clarity and reduces the labour of the reader. Any form of communication is facilitated by shared —or at least commonly understood—premises. The reader knows where the writer "is coming from". For parliamentary counsel, it produces certainty by enabling them to rely on predictable outcomes from well-established and precedented approaches. Predictability of effect is a necessary component of effectiveness and indeed of the rule of law.

But consistency can exist, and needs to operate, at different levels. I have identified three levels, which undoubtedly overlap.

High level (constitutional) consistency

At the highest level, there is a consistency in the approach to the job. Consistency at this level, although it may encompass differences of practice and degree, is essential. If parliamentary counsel cannot agree on the nature of the exercise in which they are engaged, then there is little hope that the courts will understand their role, or properly construe their work.

There is also an imperative for a legislative drafting office to understand what it is for. Legislative drafting offices need to be highly reliable organisations. What they do has to be right for many reasons, and it has to be right every time. That cannot happen unless the organisation has a clear idea of the difference between success and failure, and is intolerant of failure. Such organisations are rightly risk averse, but that has to be in the context, that in many situations the riskiest thing to do is to stand still. For those of us from the United Kingdom, London traffic provides a useful metaphor both for the dangers of standing still when everything else is moving, and also, at other times, for the proposition that, if you stand still, you get nowhere.

At the level of constitutional consistency the questions are of the following sort:

- What values are put, respectively, on clarity, simplicity, comprehensiveness, conciseness and accuracy? To what extent is detail delegated to executive decision-makers or to the makers of subordinate legislation? To what extent is it left to the courts to determine?
- What balance is recognised as the balance to be struck between the different audiences? Or at least what principles should govern the way the balance is struck? Is law to be written only for the courts or is the public an anticipated audience?
- To what extent does the drafting assume that reasoning proceeds deductively from principles to details or vice versa, inductively, by inferring principles from details?
- To what extent is unnecessary or redundant material regarded as inappropriate? And how does that relate to the value put on conciseness?
- What is the approach to the values of the rule of law? What are these values? Do they encompass all Lon Fuller's tests?[3]

[3] Which I understand were the subject of discussion at the CALC conference held in Nairobi, Kenya in September 2007.

- Is the law general rather than personal?
- Is it prospective rather than retrospective?
- Is it published and accessible?
- Is it clear?
- Is it internally consistent, so far as concepts rather than language are concerned?
- Is it intended to be more than of transitory duration?
- Does it impose obligations with which it is possible to comply?
- When it comes to application, does practice coincide with the law?

- What understanding do parliamentary counsel share about their role in relation to those instructing them?
- What risks between literalism and purposive construction is the parliamentary counsel expected to take? What precisely is the risk assessment that the parliamentary counsel is supposed to make? How does one deal with the dilemma that I well remember from when I was a drafting novice? On the one hand one could say "No court could get it wrong." On the other one could say "Just because a court could not get it wrong is no reason for avoiding the degree of precision needed to generate immediate certainty."
- What is the nature of the balance to be struck between the political part of the legislative process—a temporary phenomenon—and on the other the positivist austere character of law that is designed to be permanent. Razors are made to sell not to shave. For an example of an assumption of permanence on the statute see the *Calendar (New Style) Act 1750*, which fixed dates for Easter until the year 8,500—may be that is an example of assumed transience.

The answers to these questions and other similar ones constitute the culture of a legislative drafting service. And the culture needs to be common and, because it is human and therefore susceptible to change, it needs to be consistently shared. Change, not only stability, is supported by consistency. In an era of constitutional change, in particular, it is the whole culture, and not just its detailed context, that may be susceptible to change, and vulnerable to areas of uncertainty.

Also it is in the nature of the questions set out above that they do not produce the sort of certain answers parliamentary counsel prefer. On the other hand, without a degree of consensus on these issues, the process of legislation will inevitably degrade.

Montesquieu in his "Spirit of the Laws" argued for how the law of a country must match its national culture.

The culture of the legislative drafting service will also, in practice, identify the constitutional balance between the courts, on the one side, and the Executive and the Parliament on the other. (I

speak here in the context of the form of parliamentary system in the United Kingdom in which legislation involves collaboration between the Executive and Parliament and in practice expresses the will of the Executive so far as it is acceptable to Parliament. This needs to be distinguished from systems with a more elaborate three way separation of powers.)

And it is this central importance of the legislative drafting function to constitutional propriety and the balance between legislators and judges that means that a legislative drafting office has to be clear, and accountable for its practice in a constitutional and democratic way. This can only be through its internal governance and the way in which through that there is accountability to political and, therefore, democratic, authority. It is definitely not something on which individual parliamentary counsel can, or should, take individualistic lines.

At the constitutional level, consistency includes consistency with whatever is needed to conform to what is constitutionally and politically appropriate within the constitutional arrangements under which legislation is enacted and construed in the jurisdiction in question.

The nature of the matters to which this category of consistency relates means that there is room for some diversity in the culture; but there must, at the very least, be a common understanding of what is required. Maybe there could, in theory, be a culture allowing for total inconsistency and an anarchic approach to drafting; but a legal system with that would not have a drafting service or a sovereign Parliament—or, arguably, the rule of law—or not for long. So it does not need to be discussed.

Intermediate (legal) level consistency

Then at the next, intermediate, level, there are elements of consistency that need to be found on questions of law, and on the effect of particular provisions.

All legislative drafting proceeds on assumptions about the existing law and on premises about what it is or is not necessary to say to produce a particular effect. Some of these are based on past decisions; some on predictions for the future.

A consistent approach to these matters by parliamentary counsel is essential, because inconsistency makes the job of other parliamentary counsel impossible. It is not possible to be certain about the effects of what you are saying if different parliamentary counsel are operating on different premises about the likely effect of provisions of the same sort. Examples from United Kingdom law of the sort of issues that are involved here include the following:

- Does pre-commencement consultation fulfil a consultation requirement if no express provision is made for it? The OPC used to differ on this but the courts have now made express provision essential (See *R (on the application of Shrewsbury & Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EWCA 148).

- Does a power to make different provision for different cases include power to make different provision for different areas, or is the implication that it is not included unless mentioned expressly?
- What provisions trigger the rule against subdelegation? Does the exercise of a discretion on the authority of subordinate legislation necessarily involve a subdelegation.
- What assumptions are made about the possibility, under the doctrine of Parliamentary sovereignty, of derogating from the Human Rights Act 1998 (c. 42) in future legislation?

At this level, the points that arise may be different in character. There are points that can be argued one way or another, but will be resolved in a particular way if all parliamentary counsel work on the same premise. There are also points which can be argued one way or another and are less predictable. In those cases a risk analysis is required and a judgement made in order not to increase unpredictability.

Probably these are really only two different points on a scale of uncertainty. The scale potentially covers a very wide range of cases. It covers essentially every case where the practice of parliamentary counsel or their assumptions can make a difference to the construction of legislation. What may be controversial is the extent to which these matters overlap with matters of constitutional or technical consistency.

And the points may come to be resolved in different ways: sometimes by the Law Officers, or by parliamentary committees or by the courts or by the First Parliamentary Counsel.

Technical (drafting) level consistency

Finally, there is consistency at the technical level. At this level, the objective of consistency is not to secure a common construction. It is principally to facilitate and speed up interpretation and to help understanding by the users. The objective is to avoid confusing the user, and to provide the user with something that is familiar and easy both to navigate and to understand.

There is also at this level a reputational issue for a legislative drafting service that goes beyond just making things easy for the user. If (as in the case of OPC), a legislative drafting office is set up to achieve consistency and a common approach, then there is a potential risk to its reputation if it tolerates a degree of inconsistency at the relatively trivial technical level. Its reputation for quality and for consistency at the more important constitutional or legal level may be questioned if it is shown to be unable to achieve consistency at the technical level, even where that inconsistency causes no practical damage, at least not directly. In this context reputation is not about looking good. Rather it is about building trust with clients and the users of the statute book. Parliamentary counsel, to be effective, need to be thought of as being reliable.

But how much consistency is needed for these “reputational” purposes? The difficulty is that it is often inconsistency at the technical, albeit relatively trivial, level that is more obvious,

superficially at least, than it is at the higher levels, where, in fact, it can do more damage.

So achieving technical consistency involves judgements both about how knowledgeable the assumed reader is expected to be about the conventions of the statute book; and it is also about the inferences about constitutional and legal consistency that the assumed reader can be expected to draw from inconsistency at the technical level.

Technical consistency, however, has different manifestations. It may include signals that identify and endorse the values and culture of the legislative drafting service. To that extent it overlaps with consistency at the constitutional level. So it may for example involve acceptance of a political influence on e.g. the arrangement of clauses. The United Kingdom practice of locating definitions near the end reflects the practical need to deal with that aspect of the Bill in Parliament after it has been debated.

In this way too, technical consistency may reflect an element of the culture underpinning constitutional consistency, which takes a view on how important technical consistency is to the achievement of legal inconsistency. I think this has the potential to be regarded as an area of considerable controversy, particularly in the United Kingdom. Parliamentary counsel in the United Kingdom are constantly confronted with the question of to what extent doing something in a different way in a new context will impact on other provisions. The way in which the OPC approaches the assessment of that risk is, or at least should be, a vital element of its collective culture. An example of the development of our culture in this respect has been how the OPC is now much more relaxed than it used to be about assuming that a textual amendment needs to match the "linguistic register" of the amended provision. Nowadays the OPC leans in favour of adopting the more modern style in the amendment unless it can be demonstrated that that definitely could give rise to problems.

Structure is also part of technical consistency. If all Acts follow the basic pattern, the user will know where to find provisions (such as finding the definitions at the end of an Act).

So too is the use of words for common form provisions, such as the short title clause, the words used to provide for extent, or for the parliamentary control of legislation.

Finally, there is the use of language, "house style", practices on the use of particular words, practices with punctuation or numbering or paragraphing.

One of the problems with this form of consistency is answering the question of to what extent it is necessary or not. How much of this does in practice make a difference to the user? And, more particularly, how much do individual practices have a significant effect on parliamentary counsel. There is a temptation for parliamentary counsel to seek to work this out from first principles, or from anecdotal evidence. And let's be frank, there is a temptation for some parliamentary counsel to want to impose their own rules for internal consistency on others, just because they want an even neater system. None of this is intrinsically a bad thing, at least not so long as it flows from and reflects the culture of the legislative drafting office that secures constitutional consistency.

But it is even better to answer these questions on the basis of real evidence. And we in the OPC have been seeking the evidence in our client surveys, without, it has to be said, any clear-cut results so far.

Innovation

I have spoken at length about consistency. I shall now speak briefly about innovation. Every legislative drafting office depends crucially on the individual expertise and professionalism of its staff. In jurisdictions where there is an ongoing process of legal and constitutional change (which is probably most of them) it is essential for parliamentary counsel to adapt, and to keep up to date with the risks that legislation faces when read by users in general and, more particularly, when construed in the courts.

What is clear though is that, while a legislative drafting office may depend on innovation and creativity from its individuals, those processes need to be visible and explained to the whole organisation. The purpose of change in a legislative drafting office is to adapt and to improve, not the individual's output, but the output from the whole system. If innovation is to fulfil that purpose it needs to be communicated, explained and accepted by parliamentary counsel collectively.

Even when individual solutions are found for new or even unique problems, the information needs to be shared because it contributes to the collective wisdom. And it should draw on collective experience too. There is very little room in the sphere of legislative drafting for "trial and error". So whether a trial results in an error or in a success is something that everyone in a legislative drafting office should know about as soon as possible—in order to reduce the risk of unnecessary trials and certainly to prevent repeated errors. For the same reasons, everyone should also, if possible, have been made aware of the trial in advance.

Furthermore, the most important aspect of innovation is not in finding new, improved ways to do things that have been done before. There is scope for that; but the more common and essential purpose of innovation is the purpose of responding sensitively to changes in the system.

So the desirability of innovation and creativity is not an excuse for a self-indulgent freedom to assert your personality on the statute book. A diversity that recognises that different people may look at the same issue in different ways is healthy. A competitive attempt to create a drafting identity that is separate from that of other members of one's profession most definitely is not. To personalise what the rule of law requires to be universal is, under the United Kingdom's constitutional arrangements at least, unacceptable. The problem, as usual, is to know where to find the line between what is acceptable and what is not.

The balance

What is needed in a legislative drafting office, so far as guidance on all forms of consistency is concerned, is to strike the right balance between innovation and consistency.

In my view the ideal—and this I think is the premise on which the OPC has long operated—is to find a consensus at the highest level, the constitutional level. And that is not just a domestic office matter. At that level, it must contain elements for which parliamentary counsel are politically accountable. The premise is, however, that if consensus is achieved at the high level, much of what is required at the lower levels will flow automatically. Unfortunately, though, we do not live in a perfect world. So it is necessary to consider how much of what should flow from the consensus needs in a particular case to be separately managed into the system.

At this point, I want to suggest that there are many factors that can contribute to the mechanisms that a legislative drafting office needs in order to produce the necessary level of consistency, and to achieve the right balance with innovation.

Common to all circumstances, however, is the need for three things—

- a common acceptance that the rationale of a legislative drafting office is to take advantage of its collective strength to produce better work than could be produced by its individual members working separately;
- strong internal communications that are used for sharing practices and experiences;
- a culture that is open-minded to new approaches and determined to maintain a high quality product.

Different factors affect the measures a legislative drafting office will need to implement, in order to maintain the necessary level of consistency and to promote constructive innovation and creativity.

The size and staff "gearing" of a legislative drafting office[4] are factors that contribute to the determination of what is needed. It is relatively easy to maintain a coherent idea of what the office approach to things is in a relatively small office with a stable establishment. Once an office grows, it is more difficult. The OPC has grown from 30 to 60 in a relatively short time and this has meant a need to adjust and to establish new systems. Not only do the communications become more difficult as you grow larger; but growth also creates the potential for more divergence of practice, and that multiplies the risks such divergence brings.

In addition, the rapid expansion of the OPC had a radical effect on staff gearing: first in one direction and now, it seems, in the other.

By gearing, I mean the proportion of staff with different levels of experience. A rapid expansion followed by a period of consolidation at a fixed strength, which is what has occurred in the OPC, means an immediate influx of junior staff (producing what I shall call high gearing) followed by a period in which the proportion of senior to junior staff increases (low gearing) as the junior staff become more senior but the senior staff do not retire at the rate needed to maintain the same ratio of senior to junior staff.

Some of you may be familiar with David Maister's analysis of this phenomenon in the legal

[4] "Gearing" is a concept I explain below.

professional firm.[5] He analyses the gearing problem for the professional service firm in terms of three levels of experience of staff and the projects and tasks they can carry out, although, in that context too, he accepts that he is really talking about 3 points on a spectrum.

So his three projects are "brains" projects; "grey-haired" projects and "procedural" projects.

- Brains projects are those difficult projects that require innovative techniques. They are for the power house of the firm: the highly skilled and highly paid practitioners working hands on.
- Grey haired projects are those which are not necessarily new work but where judgement and experience are the crucial factors. The firm has built its specialism and relies on its specialist expertise to establish trust and to negotiate. Those are projects for the senior partners.
- Procedural projects are those that can be systemised and carried out using more junior staff.

The route to profitability for the professional legal firm is to have high gearing (more junior staff), and to find ways of systemising the carrying out of projects that are charged as brains or grey haired projects so that they can be carried out more cheaply using more junior staff. Gearing has to suit the business. Because professionals spend longer as seniors than juniors, there is a tendency for gearing to become lower. A firm must expand business to justify the growth required to maintain a particular level of gearing without losing staff that are becoming more senior. Or they must either change their business to justify a lower gearing or lose junior staff before they lower the gearing and replace them with more junior staff. This explains the need for the high turnover of junior staff in big stable legal firms, and their often rigid "up or out" hiring and firing practices. Those firms cannot afford to have lower gearing without changing the business and there is a limit on constant expansion.

This does not have an exact parallel with legislative drafting offices, whose hiring and firing practices and capacity to change their business are generally more circumscribed. But the analysis does have some implications for the OPC[6] that are worth considering.

Firstly, it is worth pointing out that many legislative drafting projects, certainly at the level of primary legislation, are either brains or grey-haired projects or a combination of both (i.e. somewhere on the spectrum that joins the two). This may justify a slightly lower gearing (more senior to junior staff) in a legislative drafting office than in the average professional firm.

On the other hand, perhaps subordinate legislation drafting is more readily susceptible to systemisation and thus to being carried out as procedural projects by junior staff, than primary legislation. Primary legislation projects often involve more political, "grey-haired" questions. If that is right, then a legislative drafting office with a large subordinate legislation practice, or

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[5] See *Managing the Professional Service Firm*. D. Maister (1993).

[6] And possibly for legislative drafting offices generally.

perhaps one that drafts for a relatively docile legislature[7], might need a different gearing from one where the bulk of the work is primary legislation[8]—and there is a high political content to the process.

More significantly though, the analysis may also tell us something about the different practices in different offices so far as the achievement of consistency is concerned, and about the balance with innovation and the extent of drafting guidance required.

In the OPC, as first our workload grew beyond manageable proportions, we expanded as an office, initially with a large influx of juniors. I think it would be true to say that we responded by becoming more procedurally focused. With an excessive workload, the OPC had to delegate more responsibility to junior staff and then, as their numbers increased, it became necessary to take advantage of them by quickly bringing them on stream.

I would suggest that you can trace a similar approach in legislative drafting offices that rely on itinerant parliamentary counsel or where parliamentary counsel move in and out of the rest of the government's legal service or there is a reliance on outside contractors. High gearing requires projects to be treated more as procedural projects.

In those circumstances, what is necessary is to impose consistency at the technical level so as to systemise the process in a way that emulates, and hopefully generates, consistency at the constitutional and legal level. Standards are imposed in a procedural way on the bottom from the top. Similarly, where proofing has been systemised by delegation to specialist proof readers (a way of increasing gearing), that too requires a detailed prescription of house style. A similar practice may be needed too where bilingualism is involved and the gearing is affected by the use, for example, of jurist linguists.

In the case of the OPC, as the juniors came on stream quickly, they became aware of an increasing divergence of practice partly resulting from increasing numbers, and they needed guidance at the basic level to do the day-to-day job and to make the choices between different approaches before they had acquired the experience to make them on their own judgement. This was all in the context in which rapid expansion itself created a risk for cohesion and, therefore, to the relatively informal mechanisms for maintaining the consensus on consistency at constitutional level. And, as it happened, it also coincided with a period of rapid and significant constitutional change (involving, in particular, devolution, the *Human Rights Act 1998* and a hardening of a doctrine of the separation of powers). And those changes were such that they required at least a reconsideration (and arguably a revision) of the pre-existing consensus.

In this context, a need was seen for a legislative drafting techniques group to make recommendations on the way to progress. These recommendations concentrated in the first instance principally on practical solutions to commonly occurring problems. The sort of thing that is needed for inexperienced staff required to acclimatise to new areas of work quickly. So

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[7] If there were such a thing!

[8] As is the case in the OPC.

what was produced was a number of quick and relatively simple, yet workable, solutions to problems that occur frequently.

The OPC also set up a know-how group that sought to systemise its knowledge, thus enabling it to achieve consistency at the legal level.

But we are now entering a new phase. The OPC is no longer expanding and my thesis is that, as the OPC is now maturing as an organisation, it needs to develop an approach to consistency that allows room for innovation and creativity by more experienced parliamentary counsel, but which is nevertheless more conducive to achieving consistency at the constitutional and legal levels. The OPC still has the problem of size and needs to ensure that it has systems that promote consistency and the sharing of information.

In this context, the roles of the OPC's legislative drafting techniques group and of its know-how group are evolving so as to become less authoritative and to provide a source of information that can inform a consistent approach within a shared view at the constitutional level of what consistency requires at every level.

Nevertheless, I must emphasise that the precondition for such systems is that there must be a common understanding of what constitutional consistency requires. We cannot take this for granted. For this, we need to have a cohesion and structure that supports the development and maintenance of that understanding. And "maintenance" is an important element of this, because in a changing system there has to be a common response to changes to the system.

As I have indicated, quite apart from the size and gearing of the legislative drafting office concerned, the constitutional and legal stability of a system will also determine how much consideration needs to be given over time to constitutional consistency. However, we need to exercise caution about this. From my point of view, most constitutional systems assume the existence of more continuity than does in fact exist in practice. United Kingdom constitutional arrangements have changed enormously over the time I have been with the OPC. I have mentioned already some of the more recent changes, but over my time in the OPC there have been other major changes, including the role of European Union law and some very major developments in the scope and application of administrative law.

All this has two effects. Firstly, it provides a temptation to the neophiles to change unnecessarily to adapt to constitutional developments. Secondly, it provides a temptation to the conservatives to deny the need for change. In these circumstances, a legislative drafting office needs a forum and culture that not only allow these issues to be debated and collectively assessed, but also enable a common approach to be settled.

In the United Kingdom, we have responded to this by ensuring that we have established a number of groups within the OPC to discuss and to consider matters of general interest and application. These comprise not only the legislative drafting techniques group and the know-how group, but also many others, including those providing for a more collective form of governance. One of their purposes is to expose more members of the OPC to the strategic issues with which the OPC is confronted. It is only in the light of those issues that a common approach can be settled.

The OPC has also held an office forum on the principles that should govern its drafting. Furthermore, the OPC has been researching methods of measurement, including primarily a survey of our departmental clients,[9] so that it can collectively identify what works for them and what does not. Among the things that the OPC has sought from its clients are views about its practice so far as consistency is concerned.

All of this has the objective of building cohesion and a degree of consistency at the constitutional level, in the expectation that the combination of that, coupled with the professionalism of the staff recruited and trained by the OPC, will reduce the need to have more prescriptive rules at the technical or legal level.

For me the essence of professionalism is the acceptance of a common set of values and standards and the exercise of independent judgement within that.

Our analysis has also identified the need to define the matters on which legal consistency is required and to ensure that they are dealt with collectively. Where issues arise that require a view to be taken on what is required to achieve legal consistency, it has to be an OPC view and ultimately, if possible after the consultation within the OPC, a decision for its head.

Conclusions

So, what do we need to achieve the correct balance for consistency and innovation?

We need systems that establish the context in which a common understanding of what the job involves can be established and can develop as circumstances change. Out of a more strategic approach, we can develop our approach at the legal and technical level. At the technical level, the OPC has identified what makes it desirable , for itself at least. This includes helping users navigate and understand the work of the OPC, preserving its reputation for consistency at the more important level and achieving efficiency when it wishes to systemise tasks, or is forced to by pressure of work or the demands of its gearing or demography.

And the other things the OPC needs are the best possible communications and a culture of openness that will allow everyone in the OPC to know and understand the judgements within that culture that their colleagues are making. A culture that says “If anyone wants to learn from me, they can read the Acts I have drafted” is not enough. More proactive sharing of practice is the only way to ensure that the development of the culture and adherence to it is self adjusting. Consistency and innovation are things that both need to contribute to the corporate purpose of having a legislative drafting office. They can only contribute in that way if information about their practice is shared.

I set out to describe how a legislative drafting office can balance the need for consistency with the need for innovation. I have produced a conceptual analysis of what I think is necessary to produce a healthy culture of openness and professionalism in a maturing office. I have also, I hope, identified why different situations in different offices may require different solutions or

[9] Many other legislative drafting offices do the same.

different balances in the solutions they offer.

The question for you is, perhaps, to ask yourselves what the culture is in the legislative drafting office to which you belong. Why is it the way it is? Is it able to adapt to change, whether affecting itself or to the context in which it operates? How does it adapt?

More CALC 2009 conference participants, featuring [l to r] Paul Peralta (Gibraltar), Warren Cole (New Zealand) and Fanny Ip (Hong Kong)

Professional Responsibilities of Legislative Counsel[1]

John Mark Keyes[2]

Abstract:

This article considers the 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. The starting point for understanding these responsibilities is a consideration of to whom they are owed, in other words: who is the client. The answer to this question is the basis for particular responsibilities relating to quality of service, conflict of interest and confidentiality. The scope of these responsibilities is vast and sometimes not altogether clear. This article aims to shed some light on them and provoke further consideration of their nature and content

Introduction

Over the course of my career as a legislative counsel I have seen some remarkable changes in the way we provide drafting and related advisory services in the Canadian Department of Justice. The notion of a legislative counsel who works alone producing drafts from written instructions[3]

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[1] Paper presented at the conference of the Commonwealth Association of Legislative Counsel, Hong Kong, 1-3 April 2009

[2] Chief Legislative Counsel, Department of Justice (Canada). The views expressed in this paper are those of the author in his personal capacity and are not necessarily those of the Department of Justice (Canada). The author also acknowledges the invaluable comments and suggestions that many of his colleagues in the Department have made on previous drafts of the paper.

[3] See for example E.A. Driedger, The Composition of Legislation, 2nd ed. (Department of Justice, Ottawa: 1976) at xvii:

has given way to someone who works in a far more interactive environment that entails a range of expectations going well beyond formulating the wording of a draft bill or regulation.

One of the most striking indicators of these changes is the terminology used to describe the relationship that legislative counsel have with those who provide drafting instructions. When I began drafting in the mid-1980s for the Canadian Federal Government, these people were called "instructing officers". The term suggested someone who held an office within the government and who had certain functions that complemented those of legislative counsel in the preparation of legislation. This notion was supported by a series of Cabinet Directives in the late 1940s requiring all Government bills to be drafted by counsel in the Department of Justice. And it was reinforced on an ongoing basis by Cabinet decisions authorising particular bills to be drafted by the Legislation Section of the Department in conjunction with officials from the departments responsible for the bills.

Towards the late 1980s, a subtle shift occurred in the terminology used to describe our working relationships. We began to talk about "clients". This came about as part of a more general change in the way the Department of Justice as a whole provided legal services. The change was encapsulated in the phrase "client-driven services". It was inspired by the private sector model for providing legal services and has led to time-keeping and cost-recovery practices within the Department. The objective was to improve the quality of legal services to the Government and make Department of Justice counsel more responsive to its objectives and priorities.

Legal counsel in the Canadian Federal Government now straddle two worlds. The first of these worlds is that of public office holders who exercise or support the exercise of public powers, duties and functions within a legal framework founded on the Canadian Constitution. The second is the world of legal service delivery in which law is recognised not only as a potential constraint on government action, but as a facilitator or tool as well.

Against this background, this paper looks at the responsibilities of those who draft legislation as legal professionals who are qualified to practise law under the regulatory regimes that govern their profession, whether as lawyers, barristers, solicitors or notaries. To be sure, there are others who draft legislation in the sense of formulating legislative text, but if they are not members of

> Working by himself, [the draftsman] prepares a first draft of the proposed bill or, in the case of a lengthy or complicated bill, a first draft of a portion of it. He cannot work with other people looking over his shoulder and offering comments. And no satisfactory draft can be prepared by a group of draftsmen acting as a drafting committee; they will all have different ideas about how the work should be done, there will be endless discussions over trivialities, and the final product will be at best only a compromise. Drafts can be discussed, criticized and tested in a discussion group, but the responsibility for setting up the draft or making any changes must devolve upon one person.

While there is still some truth in this characterization of how a legislative counsel must function, the practice in the Department of Justice has evolved beyond it, most notably in terms of the co-drafting of bilingual legislation by two legislative counsel and the use of drafting rooms fitted with computers for interactive discussion of drafts with instructing officials.

the legal profession, or are not providing their services as such, then they are not qualified to provide the legal advice necessary to ensure that the draft text will operate to bring about the legal result that is sought. Legislative text is much more than an assembly of words. It is a text that will function within a legal system, particularly in terms of its legislative components. Knowledge of the legal system and advice on how it works are essential parts of legislative drafting. Legislative drafting is also unquestionably an activity associated with the practice of law and one that can be provided only by a legal professional in jurisdictions where the practice of law is restricted to those who are professionally qualified to practise it.

Although there is a small body of writing on the professional responsibilities of legislative counsel,[4] the topic is somewhat neglected, perhaps because it is too often taken for granted that legislative counsel know all there is to know about it and little remains to be said. I believe that nothing could be further from the truth and that in writing this paper I may be able to prompt discussion, if not add something useful, on this important topic.

In this paper I outline the sources and general nature of professional responsibilities of legal practitioners and consider to whom these responsibilities are owed. I also look at the overlapping responsibilities of those who are public servants employed by a government or legislative assembly. My purpose is to outline the salient features of, and the distinctions among, the various professional norms that apply to legislative counsel and to deepen our understanding of them. Some of these features entail matters of some complexity. I do not deal with them exhaustively, but instead point to them as areas for further consideration. My objective is to consider how these responsibilities fit together in the context of legislative counsel. I also consider the extent to which the fit is not altogether comfortable and suggest that these responsibilities may need to be adjusted in some respects, particularly as concerns giving advice, carrying out instructions, conflict of interest and confidentiality.

Sources and Nature of Professional Responsibilities

There are three main groups of professional responsibilities of legislative counsel. The first relate to the legal profession. The second relate to counsel who are employed by a public sector body. The third are specific to legislative counsel. Each group is considered in turn below.

Legal Profession

The responsibilities of legislative counsel as legal professionals flow from their membership in an association that has authority to regulate the practice of law (lawyers, barristers, solicitors or notaries) in a particular jurisdiction. For public sector lawyers, these responsibilities are

[4] See, for example, D. MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective (2003), 24 Statute Law Review 125; R. Purdy, "Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems" (1987-88), 11 Seton Hall Legislative Journal 67; D. Marcello, "The Ethics and Politics of Legislative Drafting" (1996), 70 Tulane Law Rev. 2437.

reinforced when the conditions of their employment require membership in one or other of these associations, as is the case with legislative counsel employed by the Federal Department of Justice. In addition, the Supreme Court of Canada has recognised that members of a provincial or territorial law society, who are employed in government, including the Federal Department of Justice, are subject to professional discipline by the society to the extent that their conduct is not protected by the doctrine of prosecutorial discretion.[5] Finally, the Ontario Divisional Court has said that, in applying rules of professional conduct, public service counsel are subject to the same standards as other counsel:

> Central to the conclusion of the learned judge was his view that lawyers employed by the government have a higher professional obligation than other lawyers to observe the Rules of Professional Conduct. There is no basis for this conclusion in the laws or traditions that govern the bar of this province.
>
> All lawyers in Ontario are subject to the same single high standard of professional conduct. It is not flattering to the lawyers of Ontario to say that most of them are held to a lower standard of professional conduct than government lawyers.[6]

Codes of conduct of legal professional bodies deal with a wide range of matters pertaining to the practice of law. Their general orientation is toward serving a client who is often not in a position to judge the adequacy of the services rendered. Thus, the solicitor-client relationship transcends a commercial or employment relationship. It involves an element of trust and dependence on the part of the client that requires legal professionals to take responsibility for the quality of the services they provide. *Caveat emptor* has no place in the provision of legal services.

Professionalism in this context also entails obligations that go beyond the particular interests of the client and involve broader, societal interests that may take precedence over those of an individual client. Courts and codes of professional conduct often describe these interests in terms of maintaining a legal system that functions for the benefit of society as a whole. Legal professionals must accordingly comply with the law itself in rendering their services and must not help their clients engage in illegal activities. They also have a duty not to abuse the legal system by bringing frivolous proceedings or unduly lengthening proceedings.

Both of the elements of professionalism just described are relevant to legislative counsel, whether employed in the public service or engaged in private practice. However, many of the detailed requirements of professional codes have little relevance to the practice of law by government employees much less by those who draft legislative texts. They are focused on private clients and involve activities or transactions that do not arise in relation to government lawyers. For example, detailed rules about advertising, charging fees or handling client money have little

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5 *Krieger v. Law Society of Alberta* [2002] SCJ 45.

6 *Everingham v. Ontario* (1992), 8 OR 3d 121 (DivCt). See also the Canadian Bar Association Code (CBA Code), chapter 10:

> The lawyer who holds public office should, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

application to government lawyers who by the terms of their employment cannot practise law outside of their employment. It should also be noted that the need to protect a vulnerable client is also significantly diminished when legal services are being provided to a complex, well-resourced corporate or government client that has an employment relationship with their counsel.

Given the traditional focus of rules of professional conduct on the private practice of law, it is of interest to see that many professional codes now contain provisions relating specifically to members who are employed by public bodies.[7] Although these provisions generally confirm that their practice is subject to professional codes,[8] they also set out special provisions relating to conflict of interest, appearances before official bodies and confidentiality. In addition, Chapter 10 of the Canadian Bar Association Code of Conduct (CBA Code) says:

> 8. Generally speaking, a governing body will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely on the lawyer's integrity or professional competence may subject the lawyer to disciplinary action.[9]

By the same token, chapter 12 of the Law Society of Alberta *Code of Professional Conduct* (Alberta Code) recognises that the best interests of corporate and government clients are to be determined "as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics".[10]

These qualifications and the special rules for public sector practice recognise that there is something distinctive about it. This is not new, as Professor Alan Hutchinson has recently commented:

> The significant difference between private lawyers and government lawyers is that the latter have a much greater obligation to consider the public interest in their decisions and dealings with others than the former.[11]

The obligation to consider the public interest does not, however, translate into a higher obligation to respect the rules of professional conduct. Instead, it recognises that the public interest has greater prominence in the functions of governmental bodies than it does in relation to private individuals or corporations.

It is also worth noting that the Supreme Court of Canada has recognised that matters of professional regulation may have a double aspect in terms of the constitutional division of powers

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7 See Appendix 1for a sampling of these provisions in Canadian codes of conduct.

8 See CBA Code, c. 10; Nova Scotia Barristers Society Legal Ethics Handbook, c. 16; Law Society of Upper Canada Rules of Professional Conduct (LSUC Rules), c. 6.05.

9 See http://www.cba.org/CBA/activities/code/.

10 See http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm.

11 A. Hutchinson, "In the Public Interest: The Responsibilities and Rights of Government Lawyers" (2008), 46 Osgoode Hall Law Journal 105 at 114.

between the federal and provincial legislative spheres.[12] Thus, a federal regulatory regime for immigration consultants prevails over provincial regulatory regimes for the legal profession to the extent of any inconsistency. This suggests that the same would hold true of any conflicts between provincial regimes for the legal profession and the regulation of the professional conduct of members of the federal public service.

Public Servants

A further source of professional responsibilities, and one that helps explain the passage just quoted above, is rooted in employment in a professional public service. These responsibilities are typically expressed in codes of conduct and oaths of office for public servants[13] and flow not only out of the employment relationship between governments and their employees, but also out of the ideals of a professional, non-partisan public service.

In Canada, we have just celebrated the centenary of the creation of the Federal Civil Service Commission in 1908 that aimed to replace employment practices based on political patronage with a system of appointment on the basis of merit.[14] Luc Juillet and Ken Rasmussen in a recent book on the Public Service Commission of Canada have said:

> the history of the Commission can be understood as an evolving struggle to achieve a balance among three competing, and, at times, contradictory sets of values at the heart of public service staffing in a liberal democracy: political neutrality and independence; fairness and democratic equality; and competence and managerial efficiency.[15]

This assessment is reflected in the Values and Ethics Code of the Canadian Public Service, which says:

> Public servants shall be guided in their work and their professional conduct by a balanced framework of public service values: democratic, professional, ethical and people values.[16]

These values also resonate with some of the elements of the codes for the legal profession, notably in terms of conflict of interest and confidentiality. But they are not the same. The differences are explored below in terms of specific elements of professional responsibilities such as confidentiality and avoiding conflicts of interest.

Finally, it should be noted that chapter 1 of the Canadian Values and Ethics Code incorporates professional standards in the following terms:

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12 *Law Society of British Columbia v. Mangat* [2001] 3 SCR 113.

13 See, for example the Values and Ethics Code of the Canadian Public Service, excerpted in Appendix 2 and s. 54 of the *Public Service Employment Act*, SC 2003, c. 22, ss. 12-13..

14 SC 1908, c. 15.

15 L. Juillet and K. Rasmussen, *Merit and the Public Service,* excerpted in (2008), 38 Optimum Online 31 (http://www.optimumonline.ca/article.phtml?id=312)

16 See Appendix 2.

> In addition to the stipulations outlined in this Code, public servants are also required to observe any specific conduct requirements contained in the statutes governing their particular department or organisation *and their profession*, where applicable. [*Emphasis added*][17]

This assumes that there are no inconsistencies between the Code and other professional requirements. This remains to be seen.

Legislative Counsel

A further source of public sector responsibilities emerges in relation to legislative counsel. Many jurisdictions have legislation that frames their work and gives them particular duties relating to the legislative system as a whole. For example, section 3 of the Canadian *Statutory Instruments Act*[18] requires the Clerk of the Privy Council in consultation with the Deputy Minister of Justice to examine all proposed regulations to ensure that they meet the enumerated criteria of legality and drafting quality. Similar functions focused on the *Canadian Charter of Rights and Freedom* are found in section 4.1 of the Canadian *Department of Justice Act*.[19] A further example is the Queensland *Legislative Standards Act 1992*, which established the Office of Queensland Parliamentary Counsel and recognises a series of fundamental legislative principles that the office is responsible for ensuring are respected in the drafting of legislation.

The statutory provisions just noted and others like them express duties that are more generally recognised in relation to legislative counsel.[20] This role may be encapsulated as follows:

> … when the mandate of a drafting office is government-wide, its clients are institutions like government departments. Its responsibilities usually go beyond the interests of a particular client and embrace the functioning and maintenance of legislation as a system of law. One of its purposes is to ensure the system's coherence, intelligibility and efficiency in achieving policy objectives. These responsibilities may also include the protection of values associated with the entire legal system, such as fairness and equality. These responsibilities are sometimes described in terms of "guarding the statute book"[21]

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17 Note, however, that the reference to "their profession" does not appear in the French version:

> En plus des dispositions du présent Code, il incombe aux fonctionnaires de respecter toutes les exigences particulières en matière de conduite qui sont contenues dans les lois régissant leur ministère ou leur organisation respective, de même que les dispositions pertinentes d'application plus générale, notamment ….

18 RSC 1985, c. S-22.

19 RSC 1985, c. J-2.

20 See G.C. Thornton, *Legislative Drafting*, 3d ed. Butterworths, London, 1997 at 124ff.

21 J.M. Keyes & K. MacCormick, "Roles of Legislative Drafting Offices and Drafters" (unpublished paper presented at the 2002 Drafting Conference of the Canadian Institute for the Administration of Justice: http://www.ciaj-icaj.ca/english/publications/LD94-Maccormick.eng.pdf. See also the articles

To whom are these responsibilities owed (Who is the client)?

Underlying the general account I have just given of ethical and professional duties is a fundamental question: to whom are these duties owed or, in terms of providing legal services, who is the client? The answer not only orients the duties, it also gives them content. If a duty is to be fulfilled for the benefit of someone, their needs and desires will critically influence what the duty entails.

For someone in the private practice of law, the answer to this question is quite straightforward when services are provided to an individual. The individual is the client and there is a duty to serve them and advance their interests subject to overriding public interests in adhering to the law and preserving the integrity of the legal system.

The answer becomes more complex when services are rendered to a corporate body. This is recognised in the commentary to Rule 2.02(1.1) of the Law Society of Upper Canada *Rules of Professional Conduct*:

> A lawyer acting for an organisation should keep in mind that the organisation, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organisation or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organisation that are to be served and protected. Further, given that an organisation depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organisation is acting within that person's actual or ostensible authority.

This approach to corporate bodies arguably applies as well to public sector bodies. For example, the CBA Code defines "client" and "person" as follows:

> "client" means a person on whose behalf a lawyer renders or undertakes to render professional services;
>
> "person" includes a corporation or other legal entity, an association, partnership or other organisation, the Crown in right of Canada or a province or territory and the government of a state or any political subdivision thereof.

In turn, the Statement of Principle in Chapter 12 of the Alberta Code elaborates further on government as a client:

> A lawyer in corporate or government service has a duty to act in the best interests of the corporation or government, as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics.
>
> …

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by D. Hull and S. Laws, "The Role of Legislative Counsel: Wordsmith or Counsel?" [2008] 1 *The Loophole* 35ff.

> Likewise, the client of a lawyer employed by the government is the government itself and not a board, agency, minister or Crown corporation.[22]

Although these rules appear to be quite straightforward, the realities and complexities of government bodies are yet another matter. The "Crown" generally refers to the Executive, but "Government" can also refer to the entire apparatus of the state (as in the legislative, judicial and executive branches of government). However, for the purposes of rules of professional conduct, it may fairly be assumed that the narrower meaning is appropriate given the independence that is ascribed to the other branches of government by the separation of powers that is generally recognised in parliamentary forms of government.

Within the Executive it is also possible to differentiate distinct elements that may possess some independence from one another. For the purposes of this article I intend to explore the notion of client in this context by focusing on two further issues relating to public sector bodies as clients. The first concerns how one identifies their interests; the other concerns who provides instructions and, more generally, makes decisions on their behalf.

Determining the interests of the client

When it comes to determining a client's interests, there are some important distinctions between private corporations and governments as clients. A private corporate body generally has a set of defined objects that provide guidance as to what is in its best interests. There is also a substantial body of corporate law to help define these interests, although it is worth noting that they are increasingly being defined more broadly than as simply the interests of shareholders.[23]

The nature and interests of government bodies are not so easily or so well defined and what constitutes the "public interest" is a matter of continuing and at times highly speculative debate. Professor Hutchinson writes:

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[22] Above n. 10.

[23] See *Peoples Department Stores v. Wise* [2004] 3 S.C.R. 461, 2004 SCC 68 at para. 41-42 where the Court said:

> it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation…However, the courts have long recognised that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation.
>
> …
>
> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

> However, because there are so many competing notions of what comprises the public interest and how it should apply in particular situations, it is a notoriously difficult and contested task to designate what ends are in the public interest and what means—which must also be consistent with the public interest—are best pursued to realise those ends.[24]

This no doubt explains why the Alberta Code says that the best interests of government clients are to be determined "as they are perceived by the … government". As to what constitutes government, it goes on to say:

> Similarly, "government" is to be understood in its broadest sense. A lawyer working in a division, department or agency of the government or in a corporation ultimately controlled by the Crown is considered to be working for the government as a whole as opposed to that division, department, agency or corporation.[25]

This suggests that there is an overarching client embracing a multitude of bodies that in fact operate with varying degrees of independence from each other. For example, many administrative agencies exercise quasi-judicial functions and operate at arm's length from the Government, but they are nevertheless subject to Government directives or review of their decisions.[26] These bodies also sometimes have separate standing in court proceedings and have their own counsel rather than counsel provided by the Attorney General.[27] Many of them also have their own legal services units, rather than obtaining legal services from a central government law office such as an attorney general's department.[28] Arguably, executive oversight mechanisms for independent government agencies and corporations do not alter their need for independent legal counsel. But how does this independence fit with the concept of a single government client?

The concept of an overarching client cannot override the organisational design that is implicit in constitutional or statutory provisions that create governmental bodies. But it may nevertheless reflect limits on the extent to which various governmental bodies and the officials within them

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[24] Above n. 11 at 115-116. See also Deborah MacNair, "In the name of the public good: 'Public Interest' as a Legal Standard" (2006), *10 Can. Crim. Law Rev.* 175.

[25] Above n. 10, c. 12, G.1.

[26] See, for example, s. 89 of the *Financial Administration Act*, RS 1985, c. F-11 (directives to Crown corporations), s. 43 of the *Canada Transportation Act* (directions to the Canada Transportation Agency) and ss. 26-28 of the *Broadcasting Act*, SC 1991, c. 11 (directives to the Canadian Radio-television and Telecommunications Commission and review of its decisions on petition by any person).

[27] For example, a search of Federal Court of Appeal decisions from 2000 to 2008 yields 8 decisions on which the Canada Transportation Agency appears as a respondent and 9 decisions on which the Canadian Radio-television and Telecommunications Commission appears as the respondent in appeals of its decisions. In all these cases, the agencies in question were not represented by Crown counsel.

[28] This is the case with the Canadian Transportation Agency and the Canadian Radio-television and Telecommunications Commission.

may exercise their powers. The unity of a single client reflects the fundamental orientation towards the public interest that governmental bodies have in common. Although there may be great debate about what constitutes the public interest in any given situation, government bodies exist to define and advance it. To this extent, they are all focused on a common goal, which in the world of professional responsibilities finds its counterpart in a single client, albeit having many components and actors on its behalf. This makes it critical to determine which of them is entitled to act or provide instructions for this client and what is the scope of this entitlement.

Determining who acts for the client

The Alberta Code deals with this matter in some detail, saying:

> As an internal matter, a corporate or government client usually provides specific instructions regarding the lawyer's duties and responsibilities. These instructions may include a direction to accept instructions from and report to a particular person or group within the client.
>
> …
>
> A corporate or government lawyer is entitled to act in accordance with such instructions until they are countermanded or rescinded by the client. Since a corporation or government must act through human agents, however, counsel must be satisfied that those purporting to speak for the client have the authority to do so and that the instructions they convey are in the best interests of the client, as perceived by the client based on considerations including legal advice. Independent inquiry or verification is seldom necessary when instructions have been received through normal channels and contain no unusual or questionable elements.[29]

The responsibilities and authority of those who are employed by or otherwise act for an organisation are defined with varying degrees of specificity. In a government context, ultimate authority rests with the Cabinet and the ministers who form it. However, given the scope of government operations, a great deal must be done by officials, as has been recognised in the *alter ego* doctrine enunciated in *Carltona Ltd. v. Commissioners of Works*.[30] This diffusion of functions occurs in the first instance in terms of the organisation of government departments and agencies and their mandates. Then, within each of them, further organisational structures are put in place along with the creation of staff positions and accompanying job descriptions. Thus, legislative counsel should take instructions from officials whose responsibilities are commensurate with the instructions being given. For example, major policy decisions should be made at quite a senior level, if not by ministers themselves, while minor details may be provided by officials who work at an operational level.

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[29] Above n. 10, Chapter 12, commentary 1.

[30] [1943] 2 All ER 560 (CA).

Legislative Services Context

Government Counsel

When it comes to the drafting of legislative texts, it is sometimes difficult to establish clearly for whom legislative counsel services are being provided. This is particularly true when all regulations are to be examined by a central agency of the Crown. For example, section 3 of the Canadian *Statutory Instruments Act* requires all federal regulations to be examined by the Clerk of the Privy Counsel in consultation with the Deputy Minister of Justice. In practice, this examination often includes drafting services in addition to advice on whether the proposed regulations meet the criteria set out in section 3. Functionally, the relationship between legislative counsel in the Department of Justice and officials in the department or agency that is sponsoring the regulation closely resembles that of solicitor and client. Some agencies, however, are independent regulatory bodies. They also exercise adjudicative functions and have their own counsel who advise on the drafting of regulations. In these circumstances, who is the client of the legislative counsel? Arguably, it is the central examining authority, the Clerk of the Privy Council, but this then raises the further question of the role of the sponsoring agency. Is it in some sense an emanation of the government for the purposes of making the regulation, but not more generally in terms of its adjudicative functions? Or does it retain its independence and receive drafting and advisory services in some capacity other than as a client of the legislative counsel? There is no clear answer except that the relationship defies the neat categories of solicitor and client that one finds in the context of non-government clients.

For legislative counsel, there are generally well established rules about who they take instructions from. For example, in the Canadian Government the drafting of government bills and the instructions for them must be approved by the Cabinet.[31] The Cabinet decision provides an authoritative framework for drafting and indicates which department is responsible for providing instructions. It also underscores who has the ultimate authority to make decisions on behalf of the government as client: ministers of the Crown. This in turn provides a hierarchical orientation to determining who speaks for the government such that questions that cannot be resolved at one level may be moved up to the next.

This general structure for the provision of instructions does not altogether avoid or resolve questions about who is entitled to instruct. Legislation increasingly affects several different government departments and, although Cabinet processes are designed to resolve any conflicts they may have, they do not resolve all issues, particularly those relating to the details of how a legislative scheme is to be elaborated. The degree of Cabinet resolution also tends to diminish when legislative policy is being developed very quickly and drafting begins before it is well established. In these cases, central agencies of government, such as a Cabinet office, play a

[31] See the Cabinet Directive on Law-making, section 4: http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab_e.htm

critical role in resolving conflicts and providing definitive instructions.

However, their capacity to resolve matters is limited, as indeed is the capacity of more senior managers to resolve conflicts at lower levels. This imposes a further discipline on those responsible for dealing with these questions. Not every question can or should be moved up to the next level since general managerial expectations require that as much as possible be resolved at lower levels. Thus, legislative counsel frequently have a role in sorting out these questions by brokering solutions among departmental officials. The private sector world of an individual client who provides clear instructions is very far removed from the reality of government where instructions are often a work in progress evolving from a complex dynamic of interacting officials.

Counsel to legislative assemblies

The complexity of a client takes on another dimension when one turns to legal professionals who work for legislative assemblies composed of elected members. Counsel employed by these assemblies provide drafting and advisory services to a diverse group divided along partisan political lines with a wide range of objectives and interests. Although it may be tempting to conclude that they function rather like a private law firm serving the needs of individual clients, this is not how their services are typically rendered. Rather, they primarily serve the corporate interests of the assembly.

In the United States, this has been taken to mean that no attorney-client relationship exists between legislative counsel and individual members.[32] Such a relationship is untenable given the diversity of interests among the members of the assembly. Rather, the relationships between legislative counsel and members are determined by the interests of the assembly as a whole as well as resource considerations. The assembly has to speak with a single voice when it enacts laws: legislative counsel are needed to help ensure that this voice is coherent. By the same token, it is simply not feasible, financially or otherwise, to provide each member with separate counsel.

This is not to say that legislative counsel and individual members do not have a relationship. They clearly do, and in many respects it approaches that of a solicitor and client, for example in terms of confidentiality. It is just that the relationship is tempered by the need to make the assembly work. I will consider in more detail below how this happens in the context of my discussion of particular elements of professional responsibility.

One final point worth noting in relation to legislative assemblies is that legislative counsel for a government do not have a professional relationship with assembly members. This may seem self-evident, but members of these assemblies do not necessarily appreciate the differences between counsel who work for the assembly and those who work for the government. They occasionally lump them together as public sector counsel who all serve assembly members. Thus, it is critical that when government counsel appear before legislative committees they make it clear that they

[32] See D. Brown and D. Cartin, "Position statement on the attorney-client relationship in the legislative employment setting" (1996), 10 *The Legislative Lawyer* 3.

are not there to provide legal advice, but rather to answer questions on behalf of the government about legislation it is sponsoring. While they may be able to express a legal position on behalf of the government, they cannot provide legal advice to committee members. This distinction is discussed below.[33]

Counsel to both Government and the Legislature

A further variation on arrangements for drafting services is to have an office that serves both the Government and the members of the legislative assembly. Sometimes these offices are part of the Government, as in New South Wales, Tasmania and Ontario. In other jurisdictions, such as New Zealand, they are independent of the Government. In both cases, different legislative counsel are assigned to draft either for the Government or for members of the assembly. These arrangements go some distance towards avoiding conflicts of interest and maintaining confidentiality, but they do not provide the exclusivity of service found in the other models described above.

Giving advice and carrying out instructions

Rules and guidelines for professional conduct, whether in the legal profession or the public service, incorporate substantive limits on what can or should be done in providing legal services. Generally speaking, these limits are cast in terms of competency, maintaining the integrity of the profession and the legal system and not participating in illegal activities. These are of course also of critical importance for government counsel. In fact, they may be of even greater importance for government counsel than for those in private practice, given that government action must be based on a secure legal foundation, as opposed to private action, which is generally permitted unless prohibited.

On matters of competency, it has already been noted that professional regulatory bodies are generally not concerned with the way lawyers holding public office carry out their official responsibilities, leaving it to their employers to attend to this.[34] In the context of legislative drafting, this approach is reinforced by a case alleging negligence in the drafting of an agreement.[35] The defendant solicitor had drafted an agreement of purchase and sale of a business, but his client misunderstood the effect of a critical clause for calculating the purchase price and ended up paying more for the business than he thought he should. However, the court rejected the allegation of negligence on the basis that the client was a sophisticated businessman and that the clause was a "business clause with wording which I find was familiar to an experienced businessman in the insurance industry." If the courts are prepared to let sophisticated business people look out for themselves in terms of understanding what is drafted for them, the same is likely to be all the more true of governments.

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[33] See below at pp. 60ff.

[34] Above nn. 9 and 10.

[35] *Hallmark Financel v. Fraser & Beatty* (1990), 1 OR 3d 641 (OCGD).

A further unique dimension of government practice is how it relates to the public interest.[36] In so far as democratic government is founded on serving the public interest, legal counsel in the public sector must take it into account to a greater extent than their counterparts advising private sector clients who do not have the same focus on the public interest. In this sense, government counsel may, as Professor Hutchinson suggests, have a greater obligation to consider the public interest than do their counterparts in private practice.[37] But what is in the public interest is often difficult to define, if not a matter of some controversy.[38] How then are legislative counsel to meet these obligations to consider interests that resist clear definition and avoid illegality when they are writing the law itself? The answers to these questions may be found in the principles of constitutional government and democratic processes.

Constitutions frame legislative action and legislative counsel have an obligation to support conformity with constitutional limits when drafting laws. This obligation is recognised in provisions such as section 4.1 of the Canadian *Department of Justice Act*,[39] which requires the Minister of Justice to examine draft bills and regulations to determine whether they are inconsistent with the *Canadian Charter of Rights and Freedoms*.

However, determining consistency with constitutional limits is hardly an exact science and indeed the courts generally presume that laws are valid. This is reflected in the further obligation under section 4.1 to report to the House of Commons any inconsistency that the Minister "ascertains" from examining a draft bill or regulation. This threshold for reporting requires a high degree of certainty about the inconsistency, one that is generally considered to exist only when no credible argument can be made to oppose it.[40]

Lest this give short shrift to constitutional limits, one should note the role that the democratic process plays in law-making and the functioning of democratically elected governments. Democracy entails the popular election of officials who are thereby entrusted with the right to exercise public powers. Counsel are employed to advise them and, as Professor Hutchinson says, "to defer to such officials on what the public interest demands in deciding on policy and implementing it."[41] Thus, it is the responsibility of legislative counsel, on the one hand, to advise of the potential for a finding of unconstitutionality but, on the other, to give effect to the judgment

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36 See also Note, (2008), 121 *Harvard Law Review* 1409 at 1413-4.

37 Above n. 11.

38 See L. Pal and J. Maxwell, *Assessing the Public Interest in the 21st Century: A Framework* (Paper prepared for the External Advisory Committee on Smart Regulation, 2004) http://www.cprn.org/documents/25967_en.pdf and D. Zussman, "Governance: The New Balance between Politicians and Public Servants in Canada" 38 Optimum Online, issue 4, Dec. 2008 (http://www.optimumonline.ca/article.phtml?id=319).

39 RSC 1985, c. J-2.

40 The approach has been documented by other commentators, notably J. Hiebert, *Charter Conflicts: What is Parliament's Role?*, McGill-Queen's University Press: 2002 at 10.

41 Above n. 11 at 117.

of ministers about whether to proceed with legislation despite that potential. Legislative counsel are not judges and do not exercise power over ministers or elected members. However, they do have one option when no credible argument exists to support the constitutionality of what they are being instructed to draft: they can consider whether to continue to act. Reed Dickerson captures this approach as follows:

> How far may a draftsman give vent to his own social values when shaping deals for his client? The answer is "not very far." If he cannot remain functionally loyal to his client's views, he should withdraw from the relationship. On the other hand, a draftsman who is deferential, decently reticent, candid and diplomatic can usually make much policy in the service of his client.[42]

Although constitutionality is of the utmost importance in drafting laws, it does not, as noted above,[43] exhaust the responsibilities of legislative counsel. Another facet of their role that informs its ethical dimension is to ensure that the law is clearly stated in accordance with drafting conventions. This is not always easy, particularly when instructing officials may have an interest in preserving vagueness or ambiguity. Reed Dickerson recounts one of his experiences of this:

> There are ethical problems peculiar to legal drafting. When I was drafting laws for the Pentagon, a high-level lawyer from the National Security Agency asked me to "fuzz up" a draft bill so that, when the particular provision came back to NSA to be administered, they could interpret it to mean what they wanted to have subtly hidden in it. Although such an action would certainly not be unprecedented, I indicated that I would not participate in any scheme that put blinders on Congress.[44]

Dickerson's refusal to draft under these circumstances no doubt reflects a unique characteristic of the services that legislative counsel provide. They do not merely give advice, which their clients may or may not choose to follow. They are using their powers of expression to create something for their clients to use. The connection that legislative counsel have with their draft text arguably results in a greater sense of responsibility than if they had simply given their clients advice. And although this responsibility may be diminished by attaching cautionary advice to the draft, it cannot be completely absolved.

Conflict of Interest

Conflict of interest is a matter of some importance both for members of the legal profession as well as for public servants. It entails both actual conflicts as well as the appearance of a conflict. Although there is much common ground between the two in terms of general types of conflict of interest, the way in which they arise are often quite distinct.

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42 R. Dickerson, *The Fundamentals of Legal Drafting*, 2nd ed. (Little, Brown and Company, Toronto: 1986) at 13. See also Zussman, above n. 38.

43 See n. 21.

44 Dickerson, above n. 42.

In the legal professional context, there are three general sources of conflicts of interest:

- conflicting interests of different clients;
- conflicting interests as between legal counsel and their clients;
- conflicts between practising law and concurrently engaging in some other business, occupation or activity.[45]

Similar types of conflicts of interest are defined in the public service context in terms of private interests and public service duties.[46] They involve relationships that public servants may have with persons or organisations outside government, particularly relationships that result in personal gain. The latter are often addressed not only by codes of conduct, but also by penal sanctions for behaviour that amounts to corruption or abuse of office.[47]

Conflicting Interests of clients

Legislative counsel who work for a government or legislative assembly have, strictly speaking, only one client. They are generally employed to provide legal services exclusively to that client and are generally prohibited from practising law otherwise. Hence, there is little chance for this form of conflict to arise in terms of counsel's work during their employment for such a client. However, there is potential for conflict in terms of their work either before or after such employment. There are also, if not conflicts, tensions that can arise within the various components of a complex governmental client. I will deal here with pre- and post-employment conflicts and consider internal client tensions below under the heading of institutional conflicts.

The potential for pre- and post-employment conflicts is recognised in many professional codes when a member of one law firm transfers to another. For example, the CBA Code says:

> 23. Where the transferring member actually possesses relevant information respecting the former client that is confidential and disclosure of it to a member of the new law firm might prejudice the former client, the new law firm shall cease its representation of its client in that matter unless: …[48]

It then elaborates circumstances that will negate or mitigate the conflict.

In the context of someone transferring from private practice to employment with a public sector client, there may indeed be potential for conflict in this sense, for example when someone transfers to a law enforcement branch that deals with their former clients. It is also conceivable that there could be a conflict of interest when counsel who has advised private sector clients on a law transfers to a government agency that is revising the law as a result of litigation carried on by

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45 See CBA Code, chapters 5 and 6.

46 See Canada PS Code, chapter 2 and the *Conflict of Interest Act*, SC 2006, c. 9, s. 2 dealing with political office-holders and appointees.

47 See *Criminal Code*, RSC 1985, c. C-46, ss. 119-125.

48 Above n. 9 at chapter 5.

those clients against the government. However, it is difficult to see how a conflict could arise from the fact alone of having worked for private sector clients who are subject to a law of general application that is being revised. There is also no conflict when a change of government takes place since the client is the government and not the particular individuals who happen to hold office.

Professional codes also recognise the potential for conflict when counsel leave the government to work in the private sector. For example, chapter 5, rule 18 of the CBA Code says:

> 18. A lawyer who has information known to be confidential government information about a person, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage.

Similarly, subrule 6.05(5) of the LSUC Code says:

> (5) A lawyer who has left public office shall not act for a client in connection with any matter for which the lawyer had substantial responsibility before leaving public office.

Finally, public service codes and conflict of interest legislation also regulate post-employment activities of public servants. For example, chapter 3 of the Canadian *Public Service Code* says:

> former public servants should undertake to minimize the possibility of real, apparent or potential conflicts of interest between their new employment and their most recent responsibilities within the federal public service.[49]

It then goes on to identify particular activities that are not to be carried on within prescribed periods following departure from the public service, including—

> give advice to their clients using information that is not available to the public concerning the programs or policies of the departments or organisations with which they were employed or with which they had a direct and substantial relationship.

The seriousness with which the courts are prepared to take these provisions is amply demonstrated in *Tiboni v. Merck Frosst Canada* where the court ruled that a former Minister of Health was disqualified from acting as counsel on a matter involving the actions of his department while he was the minister.[50]

Conflicting Interests between Counsel and their Clients

What constitutes a conflict of interest with a client, whether in the professional or public service context, is often self-evident. Monetary gain and outside activities that call into question a

[49] See also Part 3 of the *Conflict of Interest Act*, SC 2006, c. 9, s. 2.

[50] 2008 CanLII 6872 (ON S.C.).

person's integrity are clear examples.[51] But for legislative counsel, the potential for conflicting interests is quite substantial given the generally broad application and scope of the legislative texts they draft. Legislative counsel are subject to the law like other citizens and may be affected by it in a personal capacity. If a rigorous concept of conflict of interest were applied to them, there would be very little legislation on which they could work. Thus, the mere fact that legislation may apply to legislative counsel themselves should not be enough to disqualify them from working on it.

Arguably, a conflict for legislative counsel must entail a personal interest that is greater or more substantial than that of most other members of the public. For example, there is no impediment to drafting general provisions for the imposition of income tax on individuals. However, the drafting of a provision for a special tax exemption for owners of a certain type of property might create such a conflict if the person drafting it owns such property too. The dividing line between the two situations may not always be easy to draw and codes of conduct generally leave some discretion for dealing with them.[52]

Responsibility for drafting legislation can also give rise to another type of conflict in terms of personal views about the merits of the policy that forms the substance of drafting instructions. When legislative counsel have strong and contradictory views about the policy, there is a conflict of interest that imperils their professional relationship and, in the public service context, their political neutrality. Although the role of a legal adviser or public servant is to give fearless, objective advice, there is a line beyond which advice becomes obstruction and confidence is undermined. It may be crossed when one loses sight of the role of elected officials to make policy decisions.

Conflicting Activities

Conflict of interest in the public service context goes beyond matters of material gain to include activities that are incompatible with public service employment. This reflects one of the fundamental underpinnings of a professional public service: political neutrality and the capacity to serve both a government of any political stripe and, more generally, the public. Political neutrality is supported both by legislative restrictions on the political activities of public servants[53] as well as by public service codes of conduct, for example the Canadian Code, which says:

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[51] Above n. 47.

[52] For example, chapter 2 of the Canada PS Code, above n. 46, says:

> Where outside employment or activities might subject public servants to demands incompatible with their official duties, or cast doubt on their ability to perform their duties in a completely objective manner, they shall submit a Confidential Report to their Deputy Head. The Deputy Head may require that the outside activities be curtailed, modified or terminated if it is determined that real, apparent or potential conflict of interest exists.

[53] See the *Public Service Employment Act*, Part 7 (Political Activities), SC 2003, c. 22.

> Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.
>
> Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.[54]

The requirement of political neutrality sets government counsel apart from their private sector colleagues. On the one hand, they must maintain a higher level of detachment from their clients while on the other hand being capable of advising their political rivals should there be a change in government.

Institutional conflict

Deborah MacNair identifies a further type of conflict of interest that is not addressed in professional or public services codes:

> The role of the Minister of Justice and Attorney General poses for many an 'institutional' conflict of interest. This has been interpreted to mean that the position, by its very nature, puts the individual who occupies it in an automatic conflict of interest. The conflict arises as a result of the dual role of the Minister. On the one hand, the Minister of Justice develops policy proposals for legislation and provides legal advisory services to the federal Crown; on the other hand, the Attorney General of Canada must exercise their responsibilities in an independent manner and in the public interest.[55]

A further dimension of this situation arises from the organisation of governments into various departments and agencies that support different ministers. Although the principle of Cabinet solidarity and the unity of the Crown amalgamate them into a single entity, the real world of politics and government is rife with internal differences among these components as to what should be done in any given situation. The policy-making and governance structures within government are intended to resolve these differences, ultimately by ensuring that they are brought to the Cabinet for final resolution if they cannot be resolved otherwise. But within these processes, individual actors within government constantly seek policy and legal support for their positions and often look to government counsel as if they were their own counsel as opposed to counsel for the larger government enterprise. Arguably, the differences among these actors produce conflicts that are similar to those that arise among individual clients in the private sector.

This type of conflict is of a somewhat different nature from the others. It is sanctioned by legislation that creates government institutions and defines the roles of those who act for them.

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[54] Ibid.

[55] Above n. 4at 145. See also James B. Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government" (1999), 42 Can. Pub. Admin. 476 at 502 discussing the tension inherent in the Minister of Justice's role in examining government bills under section 4.1 of the *Department of Justice Act*.

For example, following the Glassco Commission Report,[56] the Department of Justice was given the role of providing legal services to the whole of the Government of Canada. Thus, it may be more accurate to refer to this as an institutional *tension* rather than a conflict of interest. It is analogous to the concept of bias in administrative law. The courts have recognised that bias is not an immutable concept, but rather it varies from one public role to another. An absence of bias is generally a prerequisite for adjudicative functions where a decision-maker must maintain an even hand between the parties. However, it may have less significance in the context of legislative powers since policy-making functions presuppose a range of points of view with no "right" answer. This is exemplified in *Alaska Trainship Corporation et al. v. Pacific Pilotage Authority*[57] where the Supreme Court of Canada found that any bias in the exercise of certain regulation-making functions was authorised by the statutory framework that constituted the regulation-making authority. Laskin, CJ said:

> As LeDain J. pointed out in his reasons, the Pacific Pilotage Authority has both an operating and a regulatory function. Once the appointments to it are conceded to be validly made (and I should note they also include persons associated with shipping interests) and there is no contention of bad faith, I find it difficult to deny it the power to exercise its regulatory authority, in fact a legislative power, in accordance with the statutory prescriptions, even though there is a resulting pecuniary benefit. Such a benefit is immanent in the statute under section 9(2), if not also in the regulation-making power.[58]

If the tensions that arise in the context of providing legal, including legislative, services in the public sector fall short of conflicts of interest, they nevertheless pose challenges to those who must manage them. It may be tempting to give in to a powerful client who is also one's employer or to simply say no and hide behind security of tenure in the public service. However, the first of these is not ethical and the second is far from satisfying. The better way is to gain the confidence of client officials and engender in them respect for the advice and drafting services one renders. This is not accomplished overnight, but rather through mastery of one's craft and the ability to argue persuasively the wisdom of a recommended course of action. In government, the generally sophisticated nature of client officials means that explanations for advice are often sought, if indeed the advice is not itself challenged. In this world, legislative counsel must often be as much advocates as drafters.

Confidentiality

Confidentiality is an essential element of most professional relationships, including those of the legal profession and the public service. It is justified by the need for frank and open discussions with legal advisers and public servants. Without it, advice is less likely to be sought and those

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56 Canada, Royal Commission on Government Organisation, *Report*, Ottawa, 1962,

57 [1981] 1 S.C.R. 261.

58 Ibid., at 274.

who do seek it are less likely to disclose fully their circumstances or intentions, which in turn undercuts the effectiveness of the legal advice and counsel's role in providing it.[59]

Confidentiality is addressed in a variety of ways. In the context of legal professional relationships, the law of evidence protects confidentiality under the rubric of solicitor-client privilege,[60] which applies not only to private sector clients but also in a government context.[61] In turn, the various codes of conduct for the legal profession recognise obligations to maintain client confidentiality.

In the government context, confidentiality enjoys similar protections in terms of public service codes of conduct, information security legislation,[62] exemptions from disclosure under access to information legislation[63] and, in the evidentiary sphere, public interest immunity, which generally protects against the disclosure of information held by governments when its release would not be in the public interest.[64]

What information is protected?

Legal Professional Relationships

Solicitor-client privilege applies if three elements are present:

1. the communication must be between a solicitor and client;
2. it must entail the seeking or giving of legal advice; and
3. it must be intended to be confidential by the parties.[65]

These elements may be found in the context of government counsel's relationship with their client, but in *R. v. Campbell*, Binnie, J also recognised that—

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59 See, for example *R. v. Gruenke* [1991] 3 SCR 263, at p. 289 where Lamer, CJC said:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication....

60 *Blank v. Canada* [2006] 2 SCR 319 and *Canada v. Blood Tribe Department of Health* [2008] SCC 44. Note that litigation privilege protects communications between counsel and their clients independently of whether they are confidential.

61 See *R. v. Campbell* [1999] 1 SCR 565 at para. 49.

62 *Security of Information Act, RSC 1985*, c. O-5 (formerly the Official Secrets Act).

63 *Access to Information Act*, RSC 1985, c. A-1, ss. 13-25 and 68-69.1.

64 This privilege has traditionally been known as Crown privilege, but this is something of a misnomer, as explained by D. Paciocco and L. Stuesser, *The Law of Evidence*, 2nd ed. (Irwin Law: Toronto, 1999) at 173.

65 *Solosky v. The Queen* [1980] 1 SCR 821 at 837.

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called on to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.[66]

One area where this appears to have given rise to some debate is in relation to draft legislation. In *Cooper v. BC*,[67] Tysoe, J considered a draft of the *Mortgage Brokers Act* and concluded: "... although the document may have been prepared by legislative counsel, it does not disclose the seeking or giving of legal advice. It is not privileged and shall be disclosed." (at para. 20). However, he ordered that a similar draft containing comments by legislative counsel was not to be produced, because "It reflects the giving of legal advice and it is privileged to that extent" (at para. 25).

This decision is difficult to reconcile with the scope generally accorded solicitor-client privilege and perhaps reflects a misunderstanding of the nature of draft legislation and the services rendered by legislative counsel in preparing it. It is not merely a policy document. It also encapsulates the opinion of legislative counsel that the draft will produce in law the desired legal effect. This is quintessential legal advice.

In a legal context, confidentiality is protected not only by evidentiary privileges, but also by the various professional codes. For example, the CBA Code says that confidentiality extends to "all information concerning the business and affairs of the client acquired in the course of the professional relationship".[68] This goes further than solicitor-client privilege, as the following commentary indicates:

> This ethical rule must be distinguished from the evidentiary rule of solicitor-client privilege with respect to oral or written communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or to the fact that others may share the knowledge.[69]

Government information

In the government context, confidentiality is generally defined in terms of security requirements

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66 Above n. 61 at para. 50.

67 *Cooper v. British Columbia*, unreported, February 3, 1999. See also Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia 2002 BCSC 1509.

68 CBA Code, above n. 9, ch. 4, rule 1.

69 Ibid.

that mirror disclosure exemptions in access to information legislation. For example, the Treasury Board of Canada has elaborated information security requirements in the following terms:

> Departments must identify information and other assets when their unauthorised disclosure, with reference to specific provisions of the *Access to Information Act* and the *Privacy Act*, could reasonably be expected to cause injury to—
>
> 1 the national interest. Such information is classified. It must be categorized and marked based on the degree of potential injury (injury: "Confidential"; serious injury: "Secret"; exceptionally grave injury: "Top Secret").
>
> 2 private and other non-national interests. Such information is protected. It must be categorized and marked based on the degree of potential injury (low: "Protected A"; medium: "Protected B"; high: "Protected C").[70]

This is supplemented by guidance from the Privy Council Office that Cabinet confidences are to be classified as at least confidential if not secret or top secret.

Cabinet confidences are also protected as a matter of evidence under the rubric of public interest immunity.[71] In addition, these evidentiary protections are mirrored in access to information legislation, which protects them from disclosure. In Canada, legislation dealing with Cabinet confidences specifically limits the protection to those that are less than 20 years old. It also identifies "draft legislation / *avant projets de loi ou projets de règlement*" as a Cabinet confidence.[72]

Access to information legislation also typically provides protections for information that is protected by solicitor-client privilege.[73] This protection is relevant in relation to draft legislation that is not protected as a Cabinet confidence (for example, draft regulations of regulatory agencies). It may also have some application to the disclosure of drafting or other office manuals. To the extent that these manuals are not related to specific pieces of legislation and outline practices that are evident from reading legislation itself, they are unlikely to be subject to solicitor-client privilege. However, any portions that contain legal advice to assist officials in making drafting decisions would be protected.[74]

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70 Government Security Policy, s. 10.6 (http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12322&section=text#cha3).

71 See the *Canada Evidence Act*, RSC 1985, c. C-5, s. 39, *Carey v. Ontario* [1986] 2 SCR 637 at para. 14 and *Babcock v. Canada* [2002] SCC 57.

72 See the *Access to Information Act*, RSC 1985, c. A-1, s. 69(1)(f) and the *Canada Evidence Act*, RSC 1985, c. C-5, s. 39(2)(f).

73 See the *Access to Information Act*, RSC 1985, c. A-1, s. 23.

74 See *Ontario (Ministry of Community and Social Services) v. Ontario (Privacy Commissioner)* (2004), 70 OR 3d 680 (SCJ-DivCt), where a manual to assist officials in making enforcement decisions under family support legislation was considered to be protected by solicitor-client privilege. The decision particularly recognises that general instructions, not related to specific cases, may be protected.

Limits on confidentiality

There are some well-recognised limits on confidentiality. In the legal profession, these limits are framed in terms of disclosure required by law, such as that relating to child abuse or the prevention of a crime or serious harm.[75] The CBA Code also recognises that counsel for an organisation may have an obligation to ensure that information about wrong-doing is drawn to the attention of appropriate authorities within the organisation.[76]

In the government context, confidentiality encounters similar limits founded on legislation requiring the disclosure of wrongdoing.[77] It also runs up against demands for transparency in government. In democratic systems, the public needs to know what its elected representatives and their public servants are doing in order to hold them accountable. Transparency and accountability are the foundation of legislation that provides public access to government information. The tensions between confidentiality and transparency are played out in provisions that exclude access to legally protected forms of confidentiality, notably solicitor-client privilege and public interest immunity.[78] This is also recognised in the Canadian *Public Service Code*:

> Public servants should also strive to ensure that the value of transparency in government is upheld while respecting their duties of confidentiality under the law.[79]

Although the Supreme Court of Canada has recently affirmed that solicitor-client privilege applies with equal force in relation to government as well as private sector clients,[80] Professor Hutchinson argues that it should be limited in the interests of government transparency:

> Insofar as the rule of confidentiality is meant to protect the relatively powerless citizen against the state by ensuring effective legal representation through open communication, it does not seem either necessary or useful when the government is the putative client

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75 See, for example, the CBA Code, Chapter 4, commentaries 2, 3 and 11 and AB Code, chapter 7, rule 8.

76 Above n. 9. Rule 12 says:

> Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. If the exceptions do not apply there are, however, several steps that a lawyer should take when confronted with this problem of proposed misconduct by an organisation. The lawyer should recognise that the lawyer's duties are owed to the organisation and not to its officers, employees, or agents. The lawyer should therefore ask that the matter be reconsidered, and should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organisation despite any direction from anyone in the organisation to the contrary. If these measures fail, then it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (Chapter XII).

77 See, for example, the *Public Servants Disclosure Protection Act*, SC 2005. c. 46.

78 See ss. 37-39 of the *Canada Evidence Act* , RSC 1985, c. C-5 and s. 69 of the *Access to Information Act*, RSC 1985, c. A-1.

79 Ibid.

80 *Pritchard v. Ontario (Human Rights Commission*), [2004] 1 S.C.R. 809, 2004 SCC 31 at para. 21.

> being protected. While government business is important, it has no need of such privileges and protections. The dignity and vulnerability of individuals is not at stake in the same way. Indeed, the basic democratic commitment to openness and transparency as a vital prerequisite for accountability suggests that there is very little role for confidentiality in the affairs of government: confidentiality and open government do not sit at all well together.[81]

He goes on to suggest that the potential disclosure of legal or other advice would bring more accountability to the exercise of public powers and concedes a need for confidentiality only in relation to national security.[82]

While the objective of greater accountability is laudable, this suggestion would in practical terms neutralise the advisory role of government counsel by eliminating the space that confidentiality provides for the discussion of contentious issues. It would inhibit the conduct of litigation on behalf of the government and would, in all likelihood, induce ministers to seek advice elsewhere, if not dispense entirely with advice from public servants. This would significantly reduce the role of government counsel and the public service more generally in providing professional support and continuity in government.

One further pressure on government confidentiality arises in the context of the privileges that parliamentary bodies assert in relation to their law-making and executive oversight functions. Parliamentary committees generally have the power to summon witnesses and require the production of documents relating to their business. Parliamentary conventions suggest that committees should show restraint in the face of other privileges, but is argued that their right to obtain information takes precedence over these privileges.[83] Thus, the needs of parliamentary institutions are said to prevail over those of the governments that they keep in office.

Similar issues are played out in the United States where demands for the disclosure of government legal advice have been made in the interests of presidential accountability and respect for constitutional limits on presidential powers. A note published in the *Harvard Law Review* in 2008 recognises, on the one hand, that the relationship between the President and Congress can be seriously affected by the legal advice that the President receives, but that, on the other, there may be drawbacks to its disclosure. It accordingly suggests a compromise of sorts:

> To address these issues, the Attorney General should be required to report to Congress regularly on the substance of the legal opinions his or her office has provided to the President. The Attorney General currently issues detailed reports on the fiscal state of the Department of Justice and its accomplishment of law enforcement goals, but its disclosures to Congress about important matters of legal policy are done on an ad hoc

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81 Above n. 11 at 125-6.

82 Ibid. at 128.

83 See Diane Davidson, "The Powers of Parliamentary Committees", (1995), 18 *Canadian Parliamentary Review* http://www.parl.gc.ca/Infoparl/english/issue.htm?param=152&art=1030.

> basis. Reporting would include protections for confidential information and would not extend to discussions between the President and his or her private attorneys. At minimum, the Attorney General would point to the sources of authority under which the President has authorised action and the interpretations of congressional statutes the executive branch has made.[84]

However, the note goes on to signal caution about this proposal:

> Such a reporting obligation is admittedly open to criticism. As with the broad view of the attorney's client, reporting may reduce the President's ability to rely on advice from attorneys. If Congress is controlled by the other party, the President may choose not to seek legal advice at all. Moreover, annual reporting and up-the-ladder reporting by individual attorneys could erode the trust relationship between decision makers and attorneys. The sheer volume of legal opinions may render the reporting function an empty exercise or a waste of resources. For every opinion that has the potential to redefine the balance of power between the executive and legislative branches, there are dozens that address far more mundane matters. Finally and most importantly, a reporting obligation may increase the risk aversion of lawyers, particularly those counseling intelligence agencies. The 9/11 Commission faulted the CIA for being "institutionally averse to risk," a culture that Professor Goldsmith traced to excessive caution by agency lawyers.[85]

These reasons are compelling, but it should be noted that the Obama Administration has begun to make good on the President's 2008 campaign promises of more transparency. It has disclosed some of the legal opinions given to the previous administration that had formed the basis for counter-terrorism policies. Attorney-General Eric Holder is quoted as saying that "Americans deserve a government that operates with transparency and openness" and that he hopes to make future legal opinions by his department on such matters "available when possible while still protecting national security information and ensuring robust internal" debate.[86]

Internal information-sharing and external disclosure

Confidential information can generally be shared with those who work within an office that is providing legal services to the extent that they are involved in providing the legal services.

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84 Above n. 36 at 1428.

85 Ibid.

86 See R. Jeffery Smith and Dan Eggen, "Post 9/11 Memos Show More Bush-Era Legal Errors" Washington Post, March 3, 2009, at A05. Also note that some US states have removed solicitor-client privilege from government opinions and that there is some evidence to suggest that the existence or non-existence of solicitor-client privilege has little effect on the exchange of information among government officials: See Nancy Leong, "Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys" (2007), 20 Georgetown J. Legal Ethics 163; Melanie B. Leslie, "Government Officials as Attorneys and Clients: Why Privilege the Privileged?" (2002), 77 Ind. L.J. 469.

However, in a government context, this does not necessarily mean that information can be shared with anyone working within the government. Information-sharing must be aligned with responsibilities relating to the information. This dovetails with the previous discussion of who can act on behalf of the government as client. Thus, legislative counsel generally provide draft legislative texts only to the officials who are authorised to give them drafting instructions. Any further sharing within the government is for those officials to decide in accordance with operational requirements.

Disclosure of confidential information to persons outside an office that is providing legal services is also possible if it is authorised. In terms of information protected by solicitor-client privilege, this occurs when the privilege is waived by those who hold it.[87] This presents few difficulties with an individual client as long as they understand the nature and effect of the waiver and indicate the waiver clearly. However, in a government context, the question of who can waive the privilege is substantially more complex. It resembles the question discussed above about who has authority to provide instructions and make decisions on behalf of the government.

When legislation is being prepared under instructions from the Cabinet, it has the authority to waive solicitor-client privileges that attach to the draft legislation. Thus, in Canada the *Cabinet Directive on Law-making* says "if a draft bill is intended to be used in consultation before it is tabled in Parliament, the [Memorandum to Cabinet] should state that intention and ask for the Cabinet's agreement."[88] Authority to consult on draft regulations is granted more generally in the *Cabinet Directive on Streamlining Regulation*.[89] Authority to disclose confidential information other than draft texts is seldom given.

Waiver of public interest immunity is somewhat less clear. In *Babcock v. Canada*, the Supreme Court of Canada rejected the notion that it could be waived, but acknowledged that there was nothing to compel the government to claim it:

> As discussed, the Clerk or minister is not compelled to certify Cabinet confidences and invoke the protection of section 39(1). However, if the Clerk or minister chooses to do so, the protection of section 39 automatically follows. That protection continues indefinitely, unless—
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> the certificate is successfully challenged on the ground that it related to information that does not fall under section 39;
>
> the power of certification of the Clerk or minister has otherwise been improperly exercised;
>
> section 39(4) is engaged; or

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87 See Paciocco, above n. 64 at 150.

88 Section 4: http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab-eng.htm

89 See section 4.1: http://www.regulation.gc.ca/directive/directive01-eng.asp.

the Clerk or minister chooses to decertify the information.

The clear language of section 39(1) permits no other conclusion.

This is consistent with the fact that waiver does not apply at common law. A claim for confidentiality at common law cannot be contested on the ground that the government has waived its right to claim confidentiality. As Bingham L.J. observed in *Makanjuola v. Commissioner of Police of the Metropolis* [1992] 3 All E.R. 617 (C.A.), at p. 623, "[p]ublic interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish". Consequently, "public interest immunity cannot in any ordinary sense be waived".[90]

The disclosure of protected information to outsiders generally results in a loss of the privileges that attach to it.[91] This makes it critical to define who is and who is not a part of a government client.[92] It also means that, while a degree of confidentiality can perhaps be maintained by obtaining undertakings on non-disclosure from those to whom limited disclosure is given, the privilege may be lost for evidentiary purposes. However, this is subject to some limited exceptions.

The first is where the disclosure is to others who have a common interest with the holder of the privilege in some anticipated or pending litigation.[93] It is conceivable that this exception might be extended to apply when legislation is being drafted and privileged information is shared with outsiders who may have a common interest with the government in defending the legislation from an anticipated challenge.

A second exception applies to disclosure that is required by law. In *British Coal Corp. v. Dennis Rye (No. 2),*[94] the court held that there was no waiver of solicitor-client privilege when the plaintiff in a civil case provided privileged documents to police to aid in a criminal investigation, and those documents were subsequently required to be released to the defendant in the course of a prosecution.

A further issue that frequently arises about the confidentiality of legal advice is whether anything can be said to outsiders about a related legal issue that comes up for discussion in a public context, typically before a parliamentary committee. For example, parliamentarians who are reviewing draft legislation may have concerns about its legality and want to know about its legal basis. While it is clear that advice given to a client about such matters is protected by solicitor-

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90 Above n. 71 at paras. 30-31.

91 See *Babcock*, ibid. at para. 52.

92 See the discussion of this question above at p. 47.

93 See J. Sopinka, et al, *The Law of Evidence*, 2nd ed. (Butterworths, Toronto: 1999) at 760 citing *Wellman v. General Crane Industries Ltd* (1986), 20 OAC 384 (CA).

94 [1988] 3 All ER 816 (CA). This exception has also been applied in *Interprovincial Pipe Line Inc. v. Canada (Minister of National Revenue)* [1996] 1 FC 367 (TD) and *Philip Services Corp (Receiver of) v. Ontario Securities Commission* (2005) 77 O.R. (3d) 209 (OSCDC).

client privilege, this does not prevent a legal position from being advanced on behalf of the client, much as is done before a court or tribunal that is considering a matter involving the client.

Legal advice is offered to assist a client in making a decision. A legal position is what is expressed to others when representing a client. Although there may be a substantial overlap between the two in terms of their content, they are fundamentally different. A legal position is offered to convince someone that they should do what the client is urging them to do. It is typically expressed to a court or administrative tribunal that is charged with making a decision. But it may also be expressed to a parliamentary committee that is dealing with a bill or regulation. It differs from an opinion in that it is offered, not as advice, but rather as a viewpoint expressed on behalf of someone who is arguing a position.

Conclusion

The professional responsibilities of legislative counsel are among the most complex of any legal professionals. This complexity results from the fact that for most legislative counsel their professional responsibilities flow out of three distinct sources that are not entirely compatible.

The first is their membership in a legal professional association. These responsibilities are largely oriented toward the private practice of law given the preponderance of such practitioners in these associations. Although many associations have made efforts to adjust their rules of professional conduct to take into account government or corporate practice, the fit is not always perfect. In particular, loyalty to an individual client cannot be replicated in the context of a complex government client that acts through a variety of individuals who may shift over time as members and governments are elected and defeated.

The second source is employment in a public administration. The rules of conduct for public servants provide a better fit to the work of legislative counsel, but there are some aspects related to confidentiality that create unresolved tensions, particularly relating to the waiver of privilege. Tension is also sometimes created between public policy goals or political considerations, on the one hand, and legal constraints or legislative system considerations, on the other.

The third source is the role of legislative counsel. Although it has elements of service to a client, it also entails responsibilities as guardians of the statute book in maintaining the legislative system and respect for legal values. The latter largely represents how considerations of broader public or social interest are expressed in the context of legislative services. Even when this role is recognised in statute, it results in tension with some of the main drivers of the other two sources of professional responsibilities insofar as they are aligned principally with serving a client or achieving public policy objectives, as opposed to maintaining a functioning legislative system.

But tension is not such a bad thing. Just as the classical tripartite division of state power among the legislative, executive and judicial branches produces effective, democratically responsible government, so too a tension within the role of legislative counsel orients the business of drafting legislation toward the same result. This works because legislative counsel do not have the power to decide what the law is. They instead work with a host of others to shape it. Success in doing

this effectively and in being faithful to all three sources of their professional responsibilities depends not only on knowing their craft, but also on commanding the respect and confidence of those they serve. And on this point, Reed Dickerson's advice quoted above bears repeating: "a draftsman who is deferential, decently reticent, candid and diplomatic can usually make much policy in the service of his client."

Appendix 1—Selected Professional Rules for Public Sector Counsel

Canadian Bar Association Code of Professional Conduct

http://www.cba.org/CBA/activities/code/

Interpretation

"client" means a person on whose behalf a lawyer renders or undertakes to render professional services;

"person" includes a corporation or other legal entity, an association, partnership or other organisation, the Crown in right of Canada or a province or territory and the government of a state or any political subdivision thereof.

Chapter 5—Impartiality and Conflict of Interest between Clients

Confidential Government Information

18. A lawyer who has information known to be confidential government information about a person, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage.[14]

14 B.C. 5(9), 5(10).

Transfers

22. Paragraphs 23 to 26 do not apply to a member employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry or agency to another, continues to be 32 Code of Professional Conduct employed by that Attorney General or Department of Justice.[18]
18 B.C. 6(7.3); N.S. 6a-3; Ont. 2.05(3).

Chapter 10 – The Lawyer in Public Office

RULE

The lawyer who holds public office should, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.[1]

Commentary

Guiding Principles

1. The Rule applies to the lawyer who is elected or appointed to legislative or administrative office at any level of government, regardless of whether the lawyer attained such office because of professional qualifications.[2] Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by failure on the lawyer's part to observe its professional standards of conduct.[3]

Conflicts of Interest

2. The lawyer who holds public office must not allow personal or other interests to conflict with the proper discharge of official duties. The lawyer holding part-time public office must not accept any private legal business where duty to the client will or may conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict, but must nevertheless guard against allowing the lawyer's independent judgment in the discharge of official duties to be influenced by the lawyer's own interest, or by the interests of persons closely related to or associated with the lawyer, or of former or prospective clients, or of former or prospective partners or associates.[4]

   In the context of the preceding paragraph, persons closely related to or associated with the lawyer include a spouse, child, or any relative of the lawyer (or of the lawyer's spouse) living under the same roof, a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as a trustee or in a similar capacity, and a corporation of which the lawyer is a director or in which the lawyer or some closely related or associated person holds or controls, directly or indirectly, a significant number of shares.[5]

   Subject to any special rules applicable to a particular public office, the lawyer holding such office who sees the possibility of a conflict of interest should declare such interest at the earliest opportunity and take no part in any consideration, discussion or vote with respect to the matter in question.[6]

Appearances before Official Bodies

3. When the lawyer or any of the lawyer's partners or associates is a member of an official body such as, for example, a school board, municipal council or governing body, the

lawyer should not appear professionally before that body. However, subject to the rules of the official body, it would not be improper for the lawyer to appear professionally before a committee of such body if such partner or associate is not a member of that committee.[7]

The lawyer should not represent in the same or any related matter any persons or interests that the lawyer has been concerned with in an official capacity. Similarly, the lawyer should avoid advising on a ruling of an official body of which the lawyer either is a member or was a member at the time the ruling was made.

Disclosure of Confidential Information[8]

4. By way of corollary to the Rule relating to confidential information, the lawyer who has acquired confidential information by virtue of holding public office should keep such information confidential and not divulge or use it even though the lawyer has ceased to hold such office. As to the taking of employment in connection with any matter in respect of which the lawyer had substantial responsibility or confidential information, see commentary 3 of the Rule relating to avoiding questionable conduct (Chapter XIX).[9]

Disciplinary Action

5. Generally speaking, a governing body will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely on the lawyer's integrity or professional competence may subject the lawyer to disciplinary action.[10]

Footnotes

1 Alta. 12-S.O.P.; ABA-MC 8.8; DR 8-101(A); ABA-MR 1.11; N.B. 17-R; N.S. R-16; Ont. 6.05(1); Que. 3.05.09.

2 Common examples include Senators, Members of the House of Commons, members of provincial legislatures, cabinet ministers, municipal councillors, school trustees, members and officials of boards, commissions, tribunals and departments, Code of Professional Conduct 73 commissioners of inquiry, arbitrators and mediators, Crown prosecutors and many others. For a general discussion, see Woodman, "The Lawyer in Public Life", Pitblado Lectures (Manitoba, 1971), p. 129.

3 Ont. 6.05(1) Commentary; N.S. R-16 Guiding Principles, C-16.1.

4 ABA-MR 1.11(d); N.B. 17-C.2(a), (b), (c); N.S. C-16.2; Ont. 6.05(2) Commentary.

5 N.S. C-16.4.

6 N.B. 17-C.3; N.S. C-16.5; Ont. 6.05(2) Commentary.

7 N.B. 17-C.4; N.S. C-16.6; Ont. 6.05(4).

8 ABA-MC 9-101(A), (B); N.B. 17-C.5(a), (b); N.S. C-16.8; Ont. 3.05.10 Commentary.

9 ABA-MR 1.11(c); N.B. 17-C.6; N.S. C-16.8; Ont. 6.05(5) Commentary.

10 N.B. 17-C.9; N.S. C-16.9. In *Barreau de Montreal v. Claude Wagner* (1968), Q.B. 235 (Que. Q.B.) it was held that the respondent, then provincial Minister of Justice, was not subject to the disciplinary jurisdiction of the Bar in respect of a public speech in which he had criticized the conduct of a judge because he was then exercising his official or "Crown" functions. In *Gagnon v. Bar of Montreal* (1959) B.R. 92 (Que.) it was held that on the application for readmission to practice by a former judge, his conduct while in office might properly be considered by admissions authorities.

Law Society of Alberta Code of Professional Conduct

http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm

CHAPTER 12

THE LAWYER IN CORPORATE AND GOVERNMENT SERVICE

STATEMENT OF PRINCIPLE

A lawyer in corporate or government service has a duty to act in the best interests of the corporation or government, as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics.

RULES

1. A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client.

2. A lawyer may act in a matter for another employee of a corporation or government only if the requirements of Rule #2 of Chapter 6, *Conflicts of Interest*, are satisfied.

3. If a lawyer while acting for a corporation or government receives information material to the interests of the corporation or government, the lawyer must disclose the information to an appropriate authority in the corporation or government.

4. A lawyer must not implement instructions of a corporation or government that would involve a breach of professional ethics or the commission of a crime or fraud.

COMMENTARY

General

G.1 Definitions and application: For the purposes of this chapter, "corporation" is to be interpreted broadly and includes a sole proprietor, partnership, joint venture, society and unincorporated association. Similarly, "government" is to be understood in its broadest sense. A lawyer working in a division, department or agency of the government or in a corporation ultimately controlled by the Crown is considered to be working for the government as a whole as opposed to that division, department, agency or corporation. See Commentary 1 for a more detailed discussion of client identification.

G.2 While the ethical standards that apply to lawyers in corporations and government are the same as those applying to other lawyers, the existence of an employment relationship may generate issues that do not normally arise in private practice. The rules and commentary of this chapter are intended to assist such counsel in identifying and resolving some of these concerns. Lawyers in corporations and government may perform functions other than acting as lawyers. In this regard, see Chapter 15, *The Lawyer in Activities Other Than the Practice of Law*.

G.3 Termination of employment: A lawyer who leaves the employ of a corporation or government is governed by Rule #3 of Chapter 6, Conflicts of Interest, with respect to ability to subsequently act against the former employer. In addition, Rule #4 of that chapter applies if a lawyer moves during the currency of a matter to a firm representing another party to the matter. See also Chapter 7, Confidentiality, respecting a lawyer's obligations of confidentiality.

R.1 A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client.

C.1 The client of a lawyer employed by a corporation is the corporation itself and not the board of directors, a shareholder, an officer or employee, or another component of the corporation. Likewise, the client of a lawyer employed by the government is the government itself and not a board, agency, minister or Crown corporation.

As an internal matter, a corporate or government client usually provides specific instructions regarding the lawyer's duties and responsibilities. These instructions may include a direction to accept instructions from and report to a particular person or group within the client; to keep certain information confidential from other persons or groups within the client; or to act for more than one of its components, in circumstances that would constitute a multiple representation if the corporation or government as a whole were not the client. A corporate or government lawyer is entitled to act in accordance with such instructions until they are countermanded or rescinded by the client. Since a corporation or government must act through human agents, however, counsel must be satisfied that those purporting to speak for the client have the authority to do so and that the instructions they convey are in the best interests of the client, as perceived by the client based on considerations including legal advice. Independent inquiry or verification is seldom necessary when instructions have been received through normal channels and contain no unusual or questionable elements. The risk of inaccurate or unauthorised instructions may also lessen as organisational size and complexity decrease since the interests of the person instructing the

lawyer may be more closely identified with those of the client itself.

R.2 A lawyer may act in a matter for another employee of a corporation or government only if the requirements of Rule #2 of Chapter 6, Conflicts of Interest, are satisfied.

C.2 A corporate or government lawyer may be requested to perform legal services in circumstances in which another employee of the corporation or government expects that the lawyer will be protecting that person's interests. In some situations, it may appear that the corporation or government has no substantial interest in the matter, such as the purchase of a house by an employee. In other situations, such as the preparation of an employment contract, the corporation or government clearly has an interest that differs from that of the employee. In still others, such as the defence of both parties on a criminal or quasi-criminal charge, the corporation or government and the employee may seem to have a common interest. In any of these cases, however, the lawyer may acquire information from one party that could be significant to the other. Before the lawyer undertakes the representation, therefore, the parties must agree that there will be a mutual sharing of material information. The other requirements of Rule #2 of Chapter 6, *Conflicts of Interest*, must also be satisfied. For example, the lawyer must—

- determine that the representation is in the best interests of both parties after consideration of all relevant factors,
- stipulate that the lawyer will be compelled to cease to act in the matter if a dispute develops, unless at that time both parties consent to the lawyer's continuing to represent the corporation or government in the matter,
- obtain the consent of the parties based on full and fair disclosure of the advantages, and

disadvantages of the lawyer's acting versus the engagement of outside counsel. If the employee involved is (for example) the president of a corporate client, the consent of the corporation required by Rule #2 of Chapter 6, Conflicts of Interest, must issue from someone other than the president, such as the board of directors. If the lawyer considers the risk of divergence of interests to be high, or if one of the parties is unwilling to agree to the mutual sharing of material information, the employee must retain independent counsel. Rule #2 and this commentary also apply in principle when a corporate or government lawyer is requested to represent a third party, such as an affiliated corporation or joint venturer, having an association with the corporation or government but not forming part of it.

R.3 If a lawyer while acting for a corporation or government receives information material to the interests of the corporation or government, the lawyer must disclose the information to an appropriate authority in the corporation or government.

C.3 It is usual to convey material information respecting the interests of a corporate or government client to the person to whom the lawyer normally reports. However, there may be circumstances in which reporting information to that individual would be ineffective or inappropriate. For example, the information may relate to misconduct by that person, or the

person may have a history of refusing or failing to deal with similar information in a proper manner. In such a situation, the lawyer should report the information to other, usually more senior, authorities within the client until satisfied that the information has been conveyed to someone who will give it appropriate consideration. If a lawyer, after taking all reasonable steps to protect the client's interests, receives instructions that would involve a breach of professional ethics or the commission of a crime or fraud, the lawyer may be compelled to withdraw from the representation. (See Commentary 4) With respect to reporting a matter to authorities outside the client, see Rule #8(c) of Chapter 7, *Confidentiality*.

R.4 A lawyer must not implement instructions of a corporation or government that would involve a breach of professional ethics or the commission of a crime or fraud.

C.4 Like other lawyers, corporate and government counsel must refuse to engage in conduct that violates professional ethics. The fact that such a stand may create conflict with the client or jeopardize one's position or opportunity for advancement is not relevant from an ethical perspective. Rule #10 of Chapter 9, *The Lawyer as Advisor*, and Rule #2(a) of Chapter 14, *Withdrawal and Dismissal*, provides that withdrawal is mandatory when a client persists in instructions constituting a breach of ethics. In private practice, withdrawal is understood to mean ceasing to act in a particular matter and does not necessarily preclude a lawyer's continuing to act in other matters for the same client. Similarly, a corporate or government lawyer may "withdraw" from a given matter by refusing to implement the client's instructions in that matter, while continuing to advise the corporation or government in other respects. In the case of a profound and fundamental disagreement between lawyer and client or a pervasive institutional policy of illegality, withdrawal may also entail resignation. In most cases, however, a preferable approach is to refer the contentious matter to outside counsel, seek alternative instructions from other levels of authority in the corporation or government, or take similar action that falls short of resignation. It is a breach of ethics for a lawyer to act when the services rendered will not be competent. (See Chapter 2, *Competence*) Competence is an issue that arises in corporate and government practice as well as in private practice, particularly when a lawyer is requested by the client to provide services that are unusual or outside the scope of the lawyer's normal duties. Corporate and government counsel should therefore be aware of the issue of competence and take such steps as are necessary to ensure that the lawyer is able to satisfy in each matter undertaken the various aspects of competence described in Chapter 2, *Competence*. With respect to instructions of a corporation or government that would involve the commission of a crime or fraud, see Commentary 11 of Chapter 9, *The Lawyer as Advisor*.

Law Society of Upper Canada Rules of Professional Conduct

http://www.lsuc.on.ca/regulation/a/profconduct/

Rule 2 – Relationship to Clients, Quality of Service, Honesty and Candour

Honesty and Candour

2.02 (1) When advising clients, a lawyer shall be honest and candid.

Commentary

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

When Client an Organisation

2.02(1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organisation, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organisation.

Commentary
A lawyer acting for an organisation should keep in mind that the organisation, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organisation or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organisation that are to be served and protected. Further, given that an organisation depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organisation is acting within that person's actual or ostensible authority. In addition to acting for the organisation, the lawyer may also accept a joint retainer and act for a person associated with the organisation. An example might be a lawyer advising about liability insurance for an officer of an organisation. In such cases the lawyer acting for an organisation should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04). *[New - March 2004]*

6.05 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

6.05 (1) A lawyer who holds public office shall, in the discharge of official duties, adhere to

standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Commentary
The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards. Generally, the Society will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely on the lawyer's integrity or professional competence may be the subject of disciplinary action.

Conflict of Interest

6.05 (2) A lawyer who holds public office shall not allow professional or personal interests to conflict with the proper discharge of official duties.

Commentary
The lawyer holding part-time public office must not accept any private legal business where duty to the client will, or may, conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict but must nevertheless guard against allowing independent judgment in the discharge of official duties to be influenced either by the lawyer's own interest, that of some person closely related to or associated with the lawyer, that of former or prospective clients, or former or prospective partners or associates. Subject to any special rules applicable to the particular public office, the lawyer holding the office who sees that there is a possibility of a conflict of interest should declare the possible conflict at the earliest opportunity, and not take part in any consideration, discussion or vote concerning the matter in question.

6.05 (3) If there may be a conflict of interest, a lawyer who holds or who held public office shall not represent clients or advise them in contentious cases that the lawyer has been concerned with in an official capacity.

Appearances before Official Bodies

6.05 (4) Subject to the rules of the official body, when a lawyer or any of his or her partners or associates is a member of an official body, the lawyer shall not appear professionally before that body.

Commentary
Subject to the rules of the official body, a partner or associate may appear professionally before a committee of the official body if the partner or associate is not a member of that committee, provided that in respect of matters in which the partner or associate appears, the lawyer does not sit on the committee, take part in the discussions of the committee's recommendations, or vote on them.

Conduct after Leaving Public Office

6.05 (5) A lawyer who has left public office shall not act for a client in connection with any matter for which the lawyer had substantial responsibility before leaving public office.

Commentary
It would not be improper for the lawyer to act professionally in the matter on behalf of the public body in question. A lawyer who has acquired confidential information by virtue of holding public office should keep the information confidential and not divulge or use it, notwithstanding that the lawyer has ceased to hold such office.

Barreau de Québec – Code de déontologie [95]

SECTION III—DEVOIRS ET OBLIGATIONS ENVERS LE CLIENT

§ 5. Indépendance et désintéressement

3.05.09. L'avocat qui occupe une fonction publique ne doit pas:

a) tirer profit de sa fonction pour obtenir ou tenter d'obtenir un avantage pour lui-même ou pour un client lorsqu'il sait ou s'il est évident que tel avantage va à l'encontre de l'intérêt public;

b) se servir de sa fonction pour influencer ou tenter d'influencer un juge ou un tribunal afin qu'il agisse en sa faveur ou en faveur de la société au sein de laquelle il exerce ses activités professionnelles, d'une personne au sein de cette société ou du client;

c) accepter un avantage de qui que ce soit alors qu'il sait ou qu'il est évident que cet avantage lui est consenti dans le but d'influencer sa décision à titre d'employé public.

R.R.Q., 1981, c. B-1, r. 1, a. 3.05.09; D. 351-2004, a. 42.

Appendix 2 – Values and Ethics Code for the Public Service (Canada)

http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202800

Chapter 1

Public Service Values

Public servants shall be guided in their work and their professional conduct by a balanced framework of public service values: democratic, professional, ethical and people values.

These families of values are not distinct but overlap. They are perspectives from which to observe the universe of Public Service values.

Democratic Values: *Helping Ministers, under law, to serve the public interest.*

- Public servants shall give honest and impartial advice and make all information relevant to a decision available to Ministers.
- Public servants shall loyally implement ministerial decisions, lawfully taken.

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95 http://www.barreau.qc.ca/quebec/3/5/default.asp

- Public servants shall support both individual and collective ministerial accountability and provide Parliament and Canadians with information on the results of their work.

Professional Values: *Serving with competence, excellence, efficiency, objectivity and impartiality.*

- Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.
- Public servants shall endeavour to ensure the proper, effective and efficient use of public money.
- In the Public Service, how ends are achieved should be as important as the achievements themselves.
- Public servants should constantly renew their commitment to serve Canadians by continually improving the quality of service, by adapting to changing needs through innovation, and by improving the efficiency and effectiveness of government programs and services offered in both official languages.
- Public servants should also strive to ensure that the value of transparency in government is upheld while respecting their duties of confidentiality under the law.

Ethical Values: *Acting at all times in such a way as to uphold the public trust.*

- Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.
- Public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law.
- Public servants, in fulfilling their official duties and responsibilities, shall make decisions in the public interest.
- If a conflict should arise between the private interests and the official duties of a public servant, the conflict shall be resolved in favour of the public interest.

People Values: *Demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public servants.*

- Respect for human dignity and the value of every person should always inspire the exercise of authority and responsibility.
- People values should reinforce the wider range of Public Service values. Those who are treated with fairness and civility will be motivated to display these values in their own conduct.
- Public Service organisations should be led through participation, openness and communication and with respect for diversity and for the official languages of Canada.
- Appointment decisions in the Public Service shall be based on merit.

- Public Service values should play a key role in recruitment, evaluation and promotion.

More pictures from CALC 2009

Roger Rose (UK) making a point during a discussion of a paper presented at the 2009 CALC conference

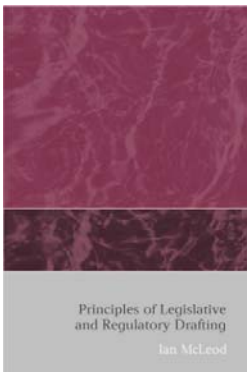
John Mark Keyes (Canada) engaging with a speaker during the 2009 CALC conference

CALC members participating at the 2009 CALC conference

John Wilson (UK) talking about his legislative drafting experiences at lunch during the 2009 CALC conference

Book Note—"Principles of Legislative and Regulatory Drafting"

Author: Ian McLeod[1]



Principles of Legislative and Regulatory Drafting provides a succinct guide to an area of law and practice which has previously been poorly served by English textbooks. It explains how drafters can convert legislative and regulatory policy into a form which has the desired effect in the most direct and accessible way.

On the basis that those who seek to communicate must be conscious of how their words will be read, it includes a chapter on interpretation. Other chapters include the nature of drafting instructions (including ethical considerations), the general principles of drafting, the protection of human rights, the creation of statutory corporations and schemes of licensing, subordinate legislation, and the creation of criminal offences.

The principles and skills of drafting are very largely common to both the legislative and regulatory fields, but the book draws attention to areas in which significant differences arise.

Extracts from the *Interpretation Act 1978* and the European Convention on Human Rights are included as Appendices.

The book provides an invaluable introduction for those engaged in legislative and regulatory drafting, while also being useful to anyone who is interested in the creation and interpretation of legislative and regulatory texts.

Summary of Contents

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[1] The author is a solicitor, a Visiting Professor of Law at Teesside University, a Senior Associate Research Fellow in the Sir William Dale Centre for Legislative Studies in the Institute of Advanced Legal Studies, London University, a member of the Commonwealth Association of Legislative Counsel and a member of the Council of the Statute Law Society.

Copies of the book are available from Hart Publishing, Oxford, UK, at the price of £20 or €30.