

# When all else fails, blame the drafters

Paul O'Brien<sup>1</sup>

## ***Introduction***

I am delighted to be back at Victoria Falls. This is my first time in Zambia but 25 years ago I visited the falls from the Zimbabwe side. In fact, that was on a trip I made directly before returning to Australia to begin my legislative drafting career, so you could say that Victoria Falls led me to drafting.

But enough about me, let's talk drafting.

Before we begin I must issue a warning that the following contains some unparliamentary language, so those of you of a sensitive disposition may be advised to read no further.

## ***The law makers***

Gerry Wood is a chook farmer<sup>2</sup> from Darwin in the Northern Territory of Australia who has been an independent member of that Territory's Legislative Assembly since 2001. He has been the bane of successive Northern Territory governments, and is a legislator who actually reads Bills and asks pertinent questions of the sponsoring Minister.

Natasha Fyles is a primary school teacher from Darwin who is now Her Majesty's Attorney-General for the Northern Territory. Now I have nothing against primary school teachers – my aunt is one – but it is unusual for one to be appointed Attorney-General.

Anyway, one of my bills came up for debate in the Legislative Assembly. It was a Bill about creating a banned drinker register to prevent the supply of liquor to people with a history of alcohol abuse - they may have been charged with an offence related to alcohol, or given an infringement notice or taken into protective custody as a result of drunken behaviour. The following exchange took place during the examination in detail of the Bill<sup>3</sup>:

Mr Wood: My broader question is why are paragraphs (c) and (d) different? Why have two sections with two different headings? Why not be clear? I am confused.

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1 Principal Parliamentary Counsel, Office of the Chief Parliamentary Counsel, Victoria, Australia and consultant drafter, Hong Kong SAR. This is an edited version of the speech I gave at the closing dinner of the CALC Conference in Livingstone, Zambia, on 3 April 2019.

2 "Chook" = chicken, hence a poultry farmer.

3 Legislative Assembly (NT) Hansard, Thursday 17 August 2017, page 2066.

- Ms Fyles: The advice I have is that the drafter provided clarity and certainty.
- Mr Wood: I am still not sure where we are going there. I found it difficult to know why that is broken up into two sections. It is difficult to read and tends to be repetitive.
- Ms Fyles: An infringement is an offence, and protective custody is not. It breaks it up in that sense.
- Mr Wood: You introduce in this next section "or a contravention notice under the Liquor Act". Are you referring to section 101U of the Liquor Act?
- Ms Fyles: Correct.
- Mr Wood: If it is referring to section 101U, why was it not included in clause 10(3)(a), which gives you all the alcohol-related infringement notices?
- Ms Fyles: It is a contravention, not a charge. The other sections are charges, and what we are putting in place is that if you have a contravention, you also go on the banned drinker register.
- Mr Wood: Why could you not just put section 101U under the definition of "alcohol-related infringement notice"? All those things there, as I read it, are part of that section.
- Ms Fyles: I have been advised it is a drafting instruction.
- Mr Wood: When all else fails, blame the drafters.

A number of years ago I drafted a bill in Victoria that changed the way tax is levied on land held in family trusts. This somewhat enraged the opposition conservative parties. To add to the mix, a government member had lost pre-selection for the next election, and had gone a bit rogue, often opposing government legislation. The following exchange took place during debate on the bill<sup>4</sup>:

- Mr Pullen (Govt): I am most concerned about what has been going on in this chamber in relation to an elected Australian Labor Party member for Ballarat Province who now sits with the opposition parties, and I hope she is listening to this.....she constantly votes against the government, and I have no doubt she will vote against this Bill.

Mr Forwood (Opp): And rightly so; it's a crock of shit!

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4 Legislative Council (Vic.) Hansard, Thursday 24 November 2005, pages 2335-2336.

Although Mr Forwood was pulled up by another government member and required to withdraw his unparliamentary language, the comment remains in Hansard for the world to read.

Sometimes the law makers have a more subliminal approach. A former distinguished Victorian Chief Parliamentary Counsel, Miss Rowena Armstrong, who will be known to many of you and who has regularly attended CALC Conferences over the years, was referred to once in the Victorian Parliament as Rowena Wallace.<sup>5</sup> Now Rowena Wallace is a popular Australian actress perhaps best known for her character in the long-running television soap opera *Sons and Daughters* who went by the nickname of Pat the Rat.

So much for what the law makers think of us.

### ***The law interpreters***

As Eamonn Moran mentioned in his presentation yesterday<sup>6</sup>, Mr Justice Callaway of the Victorian Court of Appeal observed in 1998 that:

The provisions of the Corporations Law that include s. 553C are, as I observed in the course of the argument, drafted in the language of the pop songs...<sup>7</sup>

Now anyone who was at the last CALC Conference in Melbourne or who has read their *Loophole*<sup>8</sup> will recall Ross Carter's excellent paper on the Elvis Presley/Willie Nelson classic "You were always on my mind". In that paper Ross made the excellent argument that the Pet Shop Boys' reworking of the song lyrics to remove gender references was evidence of the pop songs being drafted in the language of legislation. So Callaway JA had it the wrong way around.

Callaway JA continued his excoriation:

I am aware, of course, that there are those who believe that a statute should be drafted like a notice to quit or even a novel; their distinguished predecessors were the draftsmen of the *Code Napoleon*, later called the *Code Civil*; but an Australian Stendhal would not refresh his spirit or purify his style by dipping into legislation where the quest for simplicity pays the price of vulgarity and ends in obscurity.

Ouch!

I will leave you to look up section 553C of the Corporations Law for yourselves, but the provision, which is about sorting out debts on the liquidation of an insolvent company, seems clear and unremarkable to me.

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5 Although this appeared in the proof Hansard, it no longer appears in the official Hansard - the airbrushing of history?

6 Eamonn Moran QC, "Getting past the judge without everyone else missing the point" (Livingstone, 2019).

7 *G M & A M Pearce and Co Pty Ltd v RGM Australia Pty Ltd*, [1998] 4 VR 888 at 889.

8 *The Loophole*, September 2018, at 35-89.

Judicial criticism of drafters is not a recent phenomenon. Take this passage from the 1884 British case of *Hill v East and West India Dock*:

The section obviously is not one which has been prepared with much care or skill, or which shews indeed that the persons who were preparing it had fully present to their minds the various cases with which they had to deal."<sup>9</sup>

Like many other drafters, I am a staunch admirer of and adherent to the principles of plain language. When talking of plain language one of the first things we think of is using "must" in preference to "shall". This has caused controversy on the bench. Take, for example, Mr Justice Tadgell of the Victorian Court of Appeal. Here he is on the use of "must" and "must not":

The undiscerning use in a statute of "must not" produces its own form of ridiculousness. The use of "must" as a modal auxiliary may often appropriately express an obligation, but the mere addition of "not" may fail as an apt expression of a prohibition....In truth, "must" is a ticklish auxiliary: though useful in its proper place it deserves careful handling...There are places where "must" carries its own stamp of absurdity; and "must not", when ill-used, is even worse...Who "must not"? Is there any sanction? What if that which "must not" happen does happen? Is it to be treated as a nullity? Is the blow of the blunt instrument to be as effective as the senseless thunderbolt?...In place of each of the instances in the Act of "must not" that I have given, "shall not" or even "may not" would, I suggest, have been preferable, producing neither ambiguity nor crudity nor absurdity.<sup>10</sup>

Tadgell JA then invoked the image of "a moribund Queen Elizabeth, propped up on pillows on a stool" who, when told by a young courtier that she must go to bed, responded haughtily:

"Is "must" a word to be addressed to princes? Little man, little man, thy father, had he been alive, durst not have used that word."<sup>11</sup>

Perhaps this is why, to this day, although Victoria uses "must" in preference to "shall" in all Acts and regulations, the judges of the Supreme Court insist on maintaining "shall" in the rules of court, which we also draft.

Judges definitely do not like being told what to do. Mr Justice Weinberg of the Victorian Court of Appeal has a particular dislike of legislation in the criminal sphere. Here he is, speaking extra-judicially in 2012, about the drafting of a sentencing provision in the Commonwealth of Australia's *Crimes Act 1914*:

The history of section 16A, and the early case law surrounding the construction of that section, is illuminating. One of the very first questions raised concerns the meaning to

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9 (1884), 9 App. Cas. 448 at 455.

10 *Halwood Corporation Ltd v Roads Corporation* (1997) 20 A.A.T.R. 332 at 339-340.

11 *Ibid* at 340.

accorded to section 16A(1). That provision requires a court to impose a sentence "of a severity appropriate in all the circumstances of the offence". It would be difficult to think of a more banal, and useless, instruction. What else could a judge sentencing an offender be expected to do?<sup>12</sup>

He ramps it up:

However, even if section 16A(1) was intended to be nothing more than a piece of harmless (albeit meaningless) rhetoric, some thought should have been given to what is often described as "the law of unintended consequences". With hindsight, it should have been foreseen that even a provision drafted in such hopelessly vague terms might one day be said to be of pivotal legal importance.<sup>13</sup>

Judicial criticism of drafters continues to this day in Australia's highest court. In a recent case, Mr Justice Gageler, a former Australian Solicitor-General, made the following observation in the concluding paragraph of his judgment striking down a Western Australian statute (nicknamed the "Bell Act") that purported to quarantine assets of a failed company so that they would not be available to satisfy a tax debt to the Federal Commissioner of Taxation:

The Commissioner concludes his written submissions with the observation that the basic problem here is that the drafter of the Bell Act either has forgotten the existence of the Tax Acts or has decided to proceed blithely in disregard of their existence. That, indeed, is the basic problem<sup>14</sup>.

Returning for a moment to plain language, of course, while this ought to be the aspiration of every legislative drafter, it may not always be desirable. Former High Court of Australia justice Michael Kirby, in a 2006 interview for a University of Sydney research paper on judicial attitudes to plain language and the law<sup>15</sup> quoted the second collect for peace in the Book of Common Prayer:

"O God, who art the author of peace and lover of concord, in knowledge of whom standeth our eternal life, whose service is perfect freedom".

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12 The Labyrinthine Nature of Federal Sentencing, paper by Mark Weinberg JA to ANU College of Law Conference 11 February 2012, para 13. Paper available at:

[www.supremecourt.vic.gov.au/about-the-court/speeches/the-labyrinthine-nature-of-federal-sentencing](http://www.supremecourt.vic.gov.au/about-the-court/speeches/the-labyrinthine-nature-of-federal-sentencing)

13 Ibid, para 14.

14 *Bell Group N.V. (in liquidation) v Western Australia* [2016] HCA 21 at para. 98. The reference to the "Tax Acts" is to federal legislation that, under section 109 of the Australian Constitution, would prevail over inconsistent State legislation.

15 The transcript of the interview can be found at:

[www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_1nov06.pdf](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_1nov06.pdf)

He posited the following plain language redraft:

"God. You invented peace. Believing in you is not a burden, it's freedom".

Not quite the same vibe.

And, of course, there has also been resistance to the move to plain language from legislative drafters themselves. Let us recall the observation of former UK First Parliamentary Counsel Sir John Rowlatt, that:

The intelligibility of a Bill is in inverse proportion to its chance of being right.<sup>16</sup>

As a final word on Justice Kirby, I must acknowledge that he is one of the few judges who writes and speaks about legislative drafters in a positive tone. In a 2007 review of a book on statutory interpretation, he said:

In thirty-three years I have never allowed myself the indulgence of denouncing parliamentary drafters. Their task is often performed under fearsome pressures of time and political drama.<sup>17</sup>

Mind you, Justice Kirby is somewhat of an insider - as those of you who are also members of Clarity (the international association for legal plain language) will know, he is a patron of that association and a frequent speaker at Clarity conferences.

### ***Do they have a point?***

Well, as drafters, we all think our words are pearls of wisdom and our drafting cannot be improved. However, some examples from the statute book do cause a certain amount of bewilderment:

Consider the following definitions, the first from Victoria and the second from Tasmania:

**woman** means a female human<sup>18</sup>

**forest** means an area containing trees<sup>19</sup>

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16 Taken from Sir Harold Kent's *In on the Act* (1979) as quoted by David St L Kelly in his article "Legislative drafting and plain English" (1986) 10(4) *Adelaide Law Review* 409 at 422. Although, Professor Kelly suggested in his article that the remark may well have been tongue-in-cheek.

17 Kirby J, review of the NSW Judicial Commission's Education Monograph 4: *Statutory Interpretation-Principles and Pragmatism for a New Age* in the *Judicial Officers' Bulletin*, July 2007, available at: [www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_jul07a.pdf](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_jul07a.pdf)

18 s3 **Infertility Treatment Act 1995** (Vic). Definition inserted in 2003, mercifully not retained when that Act was replaced by the **Assisted Reproductive Treatment Act 2008** (Vic).

19 s3 **Forest Practices Act 1985** (Tas). This one still appears to be current.

And consider the following, as a prime example of circular definitions<sup>20</sup>:

***infringement notice*** means a notice in respect of an infringement offence;

***infringement offence*** means an offence which may be the subject of an infringement notice.

I also recall fondly the heading to Division 8 of Part II of the Victorian **Property Law Act 1958**, which sadly was repealed in 1986. That heading was "Married Women and Lunatics".

Speaking of lunatics, I recently had cause to consult the Limited Partnership Ordinance of Hong Kong. Imagine my joy on reading in section 5(3):

...the lunacy of a limited partner shall not be a ground for dissolution of the partnership by the court unless the lunatic's share cannot be otherwise ascertained and realized.

Isn't it good to see that lunatics are still alive and well in Hong Kong.

However, at this point I must pause to confess another lapse - for I note that the Speaker of the National Assembly of Zambia ruled during debate on 22 February 2017 that the word "lunatic" is unparliamentary<sup>21</sup>. I humbly apologise to our conference hosts.

### ***The public***

So, having dealt with the law makers, the law interpreters and the lunatics, who's left? The public. What would they know about legislative drafting? Well, let me tell you.

In Australia we have a thing called long service leave. Employees get an extra period of leave if they work for an employer for a minimum period - generally 7 to 10 years. Usually this leave only accrues while you work for the same employer, but we have gradually been changing this for various industries by legislation. I drafted a Victorian Bill last year that allows employees in the contract cleaning industry to accrue long service leave irrespective of whether they change employers. Ms Jadwiga Dadok has worked as a cleaner at the Registry of Births, Death and Marriages in Melbourne for 27 years for many different employers and has never before been able to access long service leave. When the Bill passed she was interviewed by The Age newspaper about it. Her final comment in the interview was:

This legislation about the portable long service leave is beautiful<sup>22</sup>.

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20 Definitions in section 3 of the **Infringements Act 2006** (Vic).

21 See transcript of proceedings for Wednesday 22 February 2017 at [www.parliament.gov.zm/node/6418](http://www.parliament.gov.zm/node/6418).

22 *The Age*, September 6, 2018, p14.

Eamonn Moran said yesterday<sup>23</sup> that, as drafters, we should treat everyone equally. Well, as far as I am concerned, give me a contract cleaner over a Supreme Court judge any day!

Thank you and goodnight.

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23 Eamonn Moran QC, “Getting past the judge without everyone else missing the point” (Livingstone, 2019).



## Victorian drafters visit Hong Kong

### *Presentation to Law Drafting Division, Department of Justice, HKSAR*



Paul O'Brien (on his way home from the 2019 CALC Conference in Zambia) and Jim Soundias, both from the Office of the Chief Parliamentary Counsel, Victoria, Australia, gave a presentation to colleagues in the Law Drafting Division of the Hong Kong Department of Justice on Friday 12 April 2019. The topics covered continuing professional development (CPD) requirements for drafters in Victoria and knowledge management in the Victorian office.

Paul and Jim would like to thank LDD for their hospitality.



## Post-Legislative Scrutiny Course in London, 1 to 5 July 2019

***1-week course prepared by a multi-disciplinary and international team of academics and parliamentary development specialists***

The Institute of Advanced Legal Studies of the University of London (IALS) and the Westminster Foundation for Democracy (WFD) are joining forces in offering a certified course on Post-Legislative Scrutiny (PLS).

The course on Post-Legislative Scrutiny will delve into processes, structures and stakeholders of Post-Legislative Scrutiny, connecting ex ante and ex post scrutiny, the legal assessment and impact assessment of the implementation of legislation, a gender lens to PLS and thematic scrutiny of implementation of legislation.

Through lectures, facilitated discussions, practical exercises and document review the participants will be able to familiarize themselves with most recent research findings on the above topics. Participants will gain insights in the functioning of parliament specifically regarding the full legislative cycle approach and the place of PLS in it, skills in preparing and conducting impact assessments of legislation and practical learning experience in gathering data from multi-disciplinary sources.

For more information, click [here](#).

**IALS**

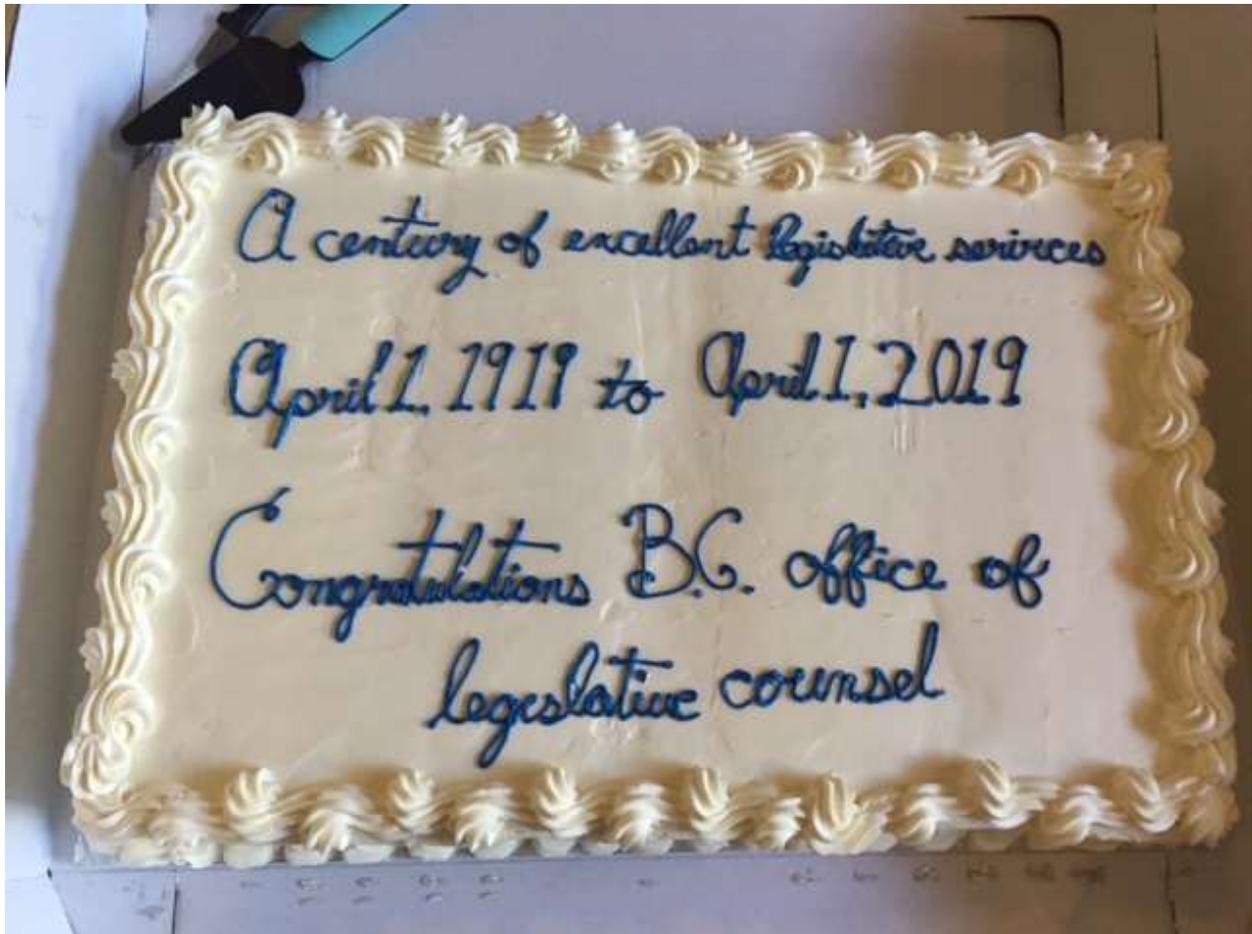


**WESTMINSTER  
FOUNDATION FOR  
DEMOCRACY**

## Office of Legislative Counsel for the Province of British Columbia, Canada – 100<sup>th</sup> anniversary

### *Exciting milestone – recognition and celebration*

The Office of Legislative Counsel for British Columbia, Canada ("OLC") is celebrating an exciting milestone this year. April 1, 2019 marked the 100th anniversary of the first appointment of Legislative Counsel in that jurisdiction. From that beginning, the OLC has grown into the law drafting and publication office it is today. To mark the occasion, a reception was held at which the OLC was privileged to have in attendance Her Honour the Lieutenant Governor, the Premier, the Attorney General and other members of the Legislative Assembly, along with numerous colleagues from Cabinet Operations, government ministries and legal services. The anniversary was then acknowledged in the Legislative Assembly, with statements from the government House Leader and members of the other parties. Congratulations to the OLC on reaching this momentous milestone!



## Ministerial Statements

### 100th ANNIVERSARY OF OFFICE OF LEGISLATIVE COUNSEL

**Hon. M. Farnworth:** I rise to make a ministerial statement.

As all of us know, we could not do our jobs in this chamber, whether in government or in opposition, without legislation before us. Today marks the 100th anniversary of the appointment of Avard Pineo as the first legislative counsel for the government of British Columbia. That appointment was made effective April 1, 1919. That is a significant achievement in terms of parliamentary democracy in this province.

The office of legislative counsel provides legislative services to our governments, including the drafting of all government bills, regulations and orders-in-council and, since 2017, the drafting of non-government bills for Members of the Legislative Assembly.

Today's modern office of legislative counsel is composed of more than legislative counsel. It includes legislative professionals, who provide editing and consolidation services; legal assistants; the registrar of regulations, who maintains the register for all enacted regulations; and the order-in-council administration office. The OIC administration office maintains records of orders-in-council and arranges for the signature of the Lieutenant-Governor on proclamations, bills and orders-in-council.

Over the past 100 years, there have been a lot of advances in their work, but one thing hasn't changed: the professionalism and dedication of these important public servants who allow us to do our job on behalf of the people of this province.

I'd ask all members of this House to congratulate the 100th anniversary of the office of legislative counsel.

**M. Lee:** I'd like to just join my colleague across the aisle in recognizing the 100th anniversary of the legislative counsel's office. Together with the Premier and the Lieutenant-Governor and the Attorney General, as well as the members from Richmond Centre and Abbotsford-Mission, we joined in today's festivities. There were two kinds of very large cakes and great humour. Also, members of our public service clearly recognize, as the member just spoke to, the importance of the level of professionalism and dedication that legislative counsel brings to our House, in our proceedings and all of the laws.

I know that when I was at law school in 1993, studying legislation and policy in first-year law, you go through much in statutory-interpretation-type courses and instruction. To have legislation that is properly drafted, clear and accessible is important. We recognize the service that legislative counsel does, including Corinne Swystun, now as the chief of legislative counsel.

I just also wanted to stand and rise, if I may, to join others, as I've heard at the session, to recognize Paul Fraser and his family on his passing. I'd like to say that Paul, clearly, made us all better. He raised the standard of professionalism for our House. He raised the level of integrity and service. The legacy that he has provided to all members of this House in the years of his service will clearly be remembered.

It's remarkable that he had a career of over 50 years. He was called to the bar in 1965. The roles that he played for this country include as a special adviser to the Ministry of Foreign Affairs on environmental treaty issues, on the industrial inquiry commission in 1995 for the rail strike, as well as to set up and establish a dispute resolution process for Canadian Indian residential school system disputes. He also had the Fraser report on pornography and prostitution in 1985.

He set a very fine example of the kinds of individuals that we need to continue to have in our public service, in this House and for this country. For that, we are entirely and eternally grateful to Mr. Paul Fraser for his service to our country and to this province.

**S. Furstenau:** As the historian of the group, I'm delighted to stand up today to join the minister and the official opposition to mark the centennial birthday of the B.C. office of legislative counsel.

Specifically, it marks the appointment of Avard Vernon Pineo to the position of the first legislative counsel in the province. I understand that Mr. Pineo was also one of the founding members of the Uniform Law Conference of Canada, which celebrated its own centennial birthday last year. But we won't talk about uniforms at all.

The B.C. office of legislative counsel has always been an active, respected and significant contributor to leading legislative initiatives in this country and in our province. I know that our staff have very much enjoyed working with legislative counsel on a variety of initiatives over the last 20 months, and we all look forward to continuing to work with them.

The employees of this office are always professional and go well above and beyond. They are diligent, hard workers who take pride in their work. They are the people behind the scenes that write our laws and ensure that our whole system works. Today I'd like to echo the minister's comments and acknowledge the central role they play in the functioning of our Legislature.

## Celebrating 20 years of shaping the law in Scotland

Congratulations to Andy Beattie's PCO Scotland on its 20<sup>th</sup> anniversary, also recently celebrated.



Celebrating 20 years of shaping the law of Scotland with a @PCOScotland cake, generously cut by the Lord Advocate



10:08 AM - 22 May 2019

8 Retweets 40 Likes

4 40

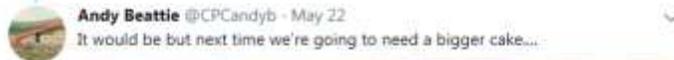


Elizabeth Gardiner @1ParliCounsel · May 22

Replying to @CPCandyb @PCOScotland

Many congratulations! Is our piece in the post?

1 5



Andy Beattie @CPCandyb · May 22

It would be but next time we're going to need a bigger cake...



## Items of interest

### ***Regulatory Institute and Handbook***

The Regulatory Institute is a non-profit organisation that assists in the improvement of laws in different jurisdictions by providing research on legislation and regulatory techniques across a number of sectors and countries. This research is provided for free through the articles published at [www.howtoregulate.org](http://www.howtoregulate.org).

The Institute believes that many insights can be gained, and indeed better regulation, from applying a transcontinental and trans-sector approach to regulatory development. Its vision is that law-makers develop regulations using good law-making methodology, such as [the Handbook “How to regulate?”](#), and regulatory techniques, so that regulations benefit us all.

In addition to our research activities, the Regulatory Institute also assists in—

- preparation of guidance materials and other texts on regulatory techniques and methods of law-making:
- provision of training, advice and consultancy services on regulatory techniques and methods of law-making:
- commenting on draft regulation on request, or in the framework of public consultations or through parliamentary processes.

[The Handbook](#) presents regulatory techniques of nine jurisdictions and a basic universal method. It is currently used by government officials and parliamentarians in the Americas, in Europe, in Africa and in Asia. It is made available free of charge because better regulations benefit us all.



## ***New Zealand: New Chief Justice, Appointments to NZSC and NZCA***

*Chief Justice, Rt Hon Dame Helen Winkelmann*



On Thursday 14 March 2019, there was a Pōwhiri (Welcome) and Swearing in Ceremonial Sitting at the Supreme Court of New Zealand in Wellington to mark the appointment of New Zealand's new Chief Justice, Dame Helen Winkelmann. Among other speakers, the Attorney-General, Hon David Parker, gave [an address](#).

The Rt Hon Dame Helen Winkelmann ([whose appointment was announced in 2018](#)) was sworn in as Chief Justice of New Zealand following [the retirement from that office of Dame Sian Elias](#).

More recently, on 2 May 2019, the Attorney-General also announced the appointment of a Supreme Court judge and a judge of the Court of Appeal.

*Supreme Court judge, Justice Joseph Williams*



Justice Joseph Victor Williams has been appointed a Judge of the Supreme Court.

An appointment to the Supreme Court was required after current Supreme Court judge Justice Sir William Young was named to chair the Royal Commission of Inquiry into the attack on the Christchurch Mosques on 15 March 2019.

Justice Williams graduated with an LLB from Victoria University in 1986 and joined the faculty as a junior lecturer in law. He graduated with an LLM (Hons) from the University of British Columbia in 1988.

In 1988 he joined Kensington Swan, establishing the first unit specialising in Māori issues in a major New Zealand law firm and developing a large environmental practice.

He became a partner at Kensington Swan in 1992, leaving in 1994 to co-found Walters Williams & Co in Auckland and Wellington.

In 1999 Justice Williams was appointed Chief Judge of the Māori Land Court. The following year, he was appointed acting Chairperson of the Waitangi Tribunal and was permanently appointed in 2004.

He was appointed as a Judge of the High Court in 2008 and a Judge of the Court of Appeal in 2018.

Justice Williams' tribal affiliations are Ngāti Pūkenga and Te Arawa (Waitaha, Tapuika).

#### *Court of Appeal Judge, Justice David Goddard*



Wellington Queen's Counsel David Goddard has been appointed a Judge of the High Court and the Court of Appeal.

Justice Goddard graduated with a BA (Hons) in mathematics from Victoria University of Wellington in 1983, subsequently gaining a BA (Hons) in law in 1986 from Oxford University in England, where he studied as a Rhodes Scholar.

Having lectured in law at Bristol University, Justice Goddard returned to New Zealand in 1988 to practise as a lawyer at Chapman Tripp. He was a litigation partner at that firm from 1991 to 1998, before beginning practice as a barrister sole in 1999.

He was appointed Queen's Counsel in 2003.

Justice Goddard has been a member of the Commonwealth Secretariat Arbitral Tribunal since May 2011, and Acting President of the Tribunal since February 2018. He has had extensive involvement in law reform in New Zealand and overseas, advising ministers and government agencies and representing New Zealand in bilateral and multilateral negotiations.

He is currently chairing a multilateral treaty process under the auspices of the Hague Conference on Private International Law, developing a convention on recognition and enforcement of judgments.

He was a Vice-President of the Diplomatic Conference that adopted the Hague Convention on Choice of Court Agreements in 2003, and a member of the drafting committee for that Treaty.

Justice Goddard has more recently been undertaking research at New York University as a Senior Global Fellow from Practice and Government in the Hauser Global Law School.

## ***New Zealand: Congratulations to Dr Briar Gordon, MNZM***



Congratulations to Dr Briar Gordon, MNZM, appointed a Member of the New Zealand Order of Merit (MNZM) for services to the law and the State in the 3 June 2019 New Zealand Queen's Birthday Honours.

The [full citation](#) is as follows:

## **GORDON, Dr Briar Elizabeth Roycroft**

For services to the law and the State

Dr Briar Gordon has contributed to the field of environmental law and has held several positions in the public sector.

Dr Gordon has worked with the Parliamentary Commissioner for the Environment, the Crown Law Office, and the Parliamentary Counsel Office. She has developed significant expertise in environmental law and Treaty of Waitangi law. She has served as an adjunct lecturer in law at Victoria University of Wellington, an author for Brookers Resource Management since 1991, and a specialist contributing author on Treaty of Waitangi matters. She has given important service to Treaty of Waitangi claims settlement legislation since 1994 and has led the development of standard clauses to streamline and provide consistency among the settlements of various iwi. She has made several presentations at international conferences. Dr Gordon has been at the forefront of enabling certain New Zealand legislation to be translated into te reo Māori and has helped to develop novel forms of redress, such as the vesting of legal personality in Te Urewera in 2014 and the Whanganui River in 2017.

Dr Briar Gordon's extraordinary contribution and services are also evident in her celebrated 2017 Melbourne CALC Conference paper and article, ["Reflecting an indigenous perspective in legislation: the challenge in New Zealand" \(January 2018\) \*The Loophole\* 81–105.](#)

## ***Australia: Queensland: Human Rights Act 2019 enacted***

In Australia, the Government of the State of Queensland introduced a [Human Rights Bill 2018](#) into the Queensland Parliament on 31 October 2018.



Attorney-General Yvette D'Ath [said](#) it was “an historic day for Queenslanders everywhere”.

“Mrs D'Ath said it was also about the everyday interactions of individuals with government.

“The Bill will require departments, agencies and public entities to make decisions and act in a way that is consistent with human rights,” she said.

“It will require the courts to interpret legislation in a way that is compatible with human rights, along with requiring the Parliament, including Parliamentary Committees, to consider whether bills are compatible with human rights.”

This Bill means Queensland will join other common law and Commonwealth countries such as Canada, the United Kingdom, New Zealand and South Africa, as well as Victoria and the Australian Capital Territory, in the legislative protection of human rights.”

For commentary, see Jack Maxwell, [“A Human Rights Act for Queensland”](#), Oxford Human Rights Hub, 26 November 2018 blog post. The Bill was referred to the Legal Affairs and Community Safety Committee on 31 October 2018 for report by 4 February 2019. For an overview of the Committee’s inquiry and for submissions to it on the Bill, click [here](#).

The Bill passed in the Queensland Parliament on 27 February 2019. Attorney-General and Minister for Justice, The Honourable Yvette D'Ath, said in a [media statement](#) that day: “Today is an historic day for Queenslanders, with their [23] rights to be enshrined in legislation”. Mrs D'Ath said the vast majority of the 280 submissions regarding the Bill were of overwhelming support.

“I would like to thank the stakeholders and members of the public who took the time to provide submissions and attend hearings. A special mention and thank you goes to the stakeholders who have been advocating for a Human Rights Act for many years; without their tenacity we would not be where we are today,” she said.

The first review of the operation of the Act will occur as soon as practicable after July 1, 2023 and will include consideration of whether additional human rights should be included.

## Taiwan: Taiwan holds first gay marriages in historic day for Asia



Taiwan’s Parliament has become the first in Asia to legalise same-sex marriage.

Lawmakers on comfortably passed part of a bill that would allow gay couples to enter into “exclusive permanent unions” and apply for marriage registration with government agencies.

In 2017, LGBT activist Chi Chia-wei brought a lawsuit that led Taiwan’s constitutional court to rule that the denial of marriage rights to same-sex couples was unconstitutional. Judges had given the government until May 2019 to pass legislation. As the deadline approached, three bills were introduced for voting.

Taiwan’s president, Tsai Ing-wen, who campaigned on a platform of marriage

equality, tweeted after the vote: “We took a big step towards true equality, and made Taiwan a better country.”

In a referendum in 2018, citizens overwhelmingly voted in favour of restricting the definition of marriage in Taiwan’s civil code to between a man and a woman.

Some 300 same-sex couples were expected to register in late May 2019, according to local authorities, around 150 in the capital Taipei which boasts a thriving and vocal gay community.

- [Lily Kuo, “Taiwan becomes first in Asia to legalise same-sex marriage” – The Guardian 17 May 2019](#)
- [William Yang, “I feel lucky’: Taiwan holds first gay marriages in historic day for Asia” – The Guardian Friday 24 May 2019](#)

## **Botswana: High Court decriminalizes gay sex**



‘Botswana’s High Court ruled in June 2019 to overturn colonial-era laws that criminalised homosexuality, a decision hailed by activists as a significant step for gay rights on the African continent.

“Human dignity is harmed when minority groups are marginalized,” Judge Michael Leburu said as he delivered the judgment, adding that laws that banned gay sex were “discriminatory.”

Three judges voted unanimously to revoke the laws, which they said conflicted with Botswana’s Constitution.

“Sexual orientation is not a fashion statement,” Judge Leburu added. “It is an important attribute of one’s personality.”:

[Kimon de Greef, “Botswana’s High Court Decriminalizes Gay Sex”, \*New York Times\*, June 11, 2019](#)

See also [Alan Yuhas, “A Win for Gay Rights in Botswana Is a ‘Step Against the Current’ in Africa”, \*New York Times\*, June 11, 2019](#) and [Bill Chappell, “Botswana’s High Court Rules Homosexuality Is Not A Crime”, NPR, June 11, 2019, 8.32 AM EST.](#)

## ***New Zealand: Regulation of government AI algorithms***



In New Zealand, a report from the University of Otago's Artificial Intelligence and Law in New Zealand Project says regulatory measures are needed to guard against the dangers of government algorithm use.

The report, [Government use of artificial intelligence in New Zealand](#), was funded by the New Zealand Law Foundation.

## ***Northern Ireland: New Second Legislative Counsel at OLC in Belfast***

A small, but vital, news item: Alex Gordon has recently moved from the Parliamentary Counsel Office in Edinburgh to the Office of the Legislative Counsel in Belfast. He says this:

After drafting Bills in Edinburgh for a month short of the whole of PCO [Scotland]’s and the Scottish Parliament’s first 20 years, I have landed in OLC in Belfast as Second Legislative Counsel. Most of you know Brenda King from her recent stint as President of CALC, and under her as First Legislative Counsel there is a great team in OLC.

OLC has an interesting history. OLC was formed nearly 100 years ago to serve the Government of Northern Ireland as established by the Government of Ireland Act 1920. Lasting as a permanent feature during Northern Ireland’s long and winding constitutional journey, OLC now serves the Northern Ireland Executive and Assembly as established by the Northern Ireland Act 1998 (which provides for the Devolved political and institutional set-up within the United Kingdom captured in what is known as the Good Friday Agreement).



The Northern Ireland Assembly sits in the Parliament Buildings at Stormont to the east of Belfast, built in a grand classical style and surrounded by a beautiful parkland estate. The Buildings opened in 1932 to accommodate the-then Parliament – comprising Commons and Senate – of Northern Ireland. OLC has been housed in the Buildings ever since, in excellent work space including traditional rooms (rather than more utilitarian open-plan arrangements).

If you ever find yourself in Northern Ireland, please feel welcome to visit us in OLC. Belfast is very much on the tourist trail these days, and there is a lot to do and see in and around the city. I am certainly enjoying it here, at both work and play.



## ***Northern Ireland: John Mark and Nancy Keyes visit Stormont***



**Alex Gordon**

@cribbagepegging

Follow



OLC hosting John Mark and Nancy Keyes at Stormont. John Mark is a Canadian of formidable drafting and academic knowledge and experience.

Excellent discussion on legislation had round the table with the whole office before breaking off with Brenda King and me for the photograph.



9:34 AM - 7 Jun 2019

## ***Jersey: Clive Borrowman celebrates birthday milestone***

Clive Borrowman, a consultant drafter based in Jersey, celebrated his 80th birthday on 7th May. Clive, an English solicitor who was also admitted to the profession in Fiji and Papua New Guinea, has been drafting legislation for over 40 years. His work has spanned 27 jurisdictions, including 13 years working for Jersey. He has also lived and worked in the UK, New Zealand, Australia, the Cayman Islands, St Helena, and Niue. Still active in drafting, Clive has many friends in Jersey, especially amongst the Hash House Harriers, with whom he celebrated his birthday, along with his wife Sue, son Mark, and other friends. We wish him many more active years.



## ***Jersey: Further staffing changes in Jersey***

Liz Walsh, Deputy Principal Legislative drafter, has relinquished her role as deputy head of the office to concentrate on an exciting 3-year project to reform Jersey's road traffic legislation. Lucy Marsh-Smith paid tribute to Liz who held the role for nearly 12 years, including undertaking a lengthy period of acting up before a new head of office was appointed.

A recruitment exercise is underway to replace Liz and also to find 2 new drafters, since Aleks Hynnä is to return to Ottawa, and another drafter has also tendered a resignation. They will both be greatly missed. Hence 2 vacancies for legislative drafters in Jersey have recently been advertised via CALC. A permanent Legislation Editor is also to be recruited locally.



**States of Jersey**  
Legislative Drafting Office

***Turning policies into Jersey law***

Customer focus - Constantly improving - Better together - Always respectful - We deliver

## ***Gibraltar: The value of CALC membership/ European Union Laws (Voluntary Implementation) Act 2019***

On 30 May 2019 the Gibraltar Parliament passed the [European Union \(Voluntary Implementation\) Act 2019](#) in anticipation of Gibraltar's exit from the European Union.

Aside from the intrinsic merits of this legislative instrument, what is more notable from a CALC perspective is that it represents the flow of information and ideas between CALC jurisdictions.



The Crown Dependencies (Jersey, Guernsey and the Isle of Man) have for a number of years had the ability to implement EU legislation that did not apply directly to the islands. At the 2018 CALC (Jersey) regional conference, this point was touched upon in several presentations and proved to be the seed for the legislative project that culminated in the passing of the Act.

It is a reflection of the important personal relationships that CALC membership allows to foster and also proof of the value of attending CALC events.

## ***Fiji: Pacific Islands Drafters' Forum ('Forum') meeting held in Suva***

A Pacific Islands Drafters' Forum ('Forum') meeting was held on 20 June 2019 in Suva, Fiji.

The meeting was attended by—

- legislative drafters from Fiji, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu;
- a representative of the Australian Attorney-General's Department ('AGD');
- representatives of the Pacific Islands Forum Secretariat ('PIFS').

There was discussion of—

- whether the Pacific Islands Drafters' Forum should fall within the scope of the Pacific Islands Law Officers' Network ('PILON');
- the draft proposal to PILON;
- the draft Pacific Tool Kit (Policy to Legislation) that was developed by AGD for policy development;
- Country updates against the Regional Action Plan on Sustainable Drafting Capacity Building in Forum Island Countries (2017–2019).



## ***United Kingdom: Point-in-time EU legislation and Rules as Code***

On 15 June 2019 the British & Irish Association of Law Librarians (BIALL) Tweeted its excitement at the following news:



**BIALL**

@biall\_uk

Follow



Point-in-time EU legislation will be made available on [legislation.gov.uk](https://legislation.gov.uk). This tweeter is excited by this news #BIALL2019

4:37 AM - 15 Jun 2019



**BIALL** @biall\_uk · Jun 15



Revamped [legislation.gov.uk](https://legislation.gov.uk) is ready to go live whenever the UK is ready to exit the EU #BIALL2019





**Elizabeth Gardiner** ✓  
@1ParliCounsel

Following

Lots of food for thought this morning  
[@ParliCounsel\\_UK](#) Computers and  
Legislation: bringing together tech experts,  
policymakers and legislative drafters. Thank  
you [@mattwadd](#) [@piawaugh](#) [@Lenorbury](#)  
[#RulesAsCode](#)



4:45 AM - 24 Jun 2019

4 Retweets 17 Likes



4 4 17



Tweet your reply



**Pia Andrews** @piawaugh · 9h

Replying to [@1ParliCounsel](#) [@ParliCounsel\\_UK](#) and 2 others

I hope it was useful, thank you for having me :)

1 1 2



**Elizabeth Gardiner** ✓ @1ParliCounsel · 9h

Really useful and great you were able to "join" us virtually from NSW. Thank you!

1 2



**johnsheridan** @johnsheridan · 7h

Replying to [@1ParliCounsel](#) [@ParliCounsel\\_UK](#) and 3 others

I'm really enjoying today's conference about Computers and Legislation. Thanks to [@ParliCounsel\\_UK](#), [@1ParliCounsel](#) and [@Lenorbury](#) for organising such a fascinating range of speakers. Lots to think about, not least for digital archivists.

2



**Constantin Stefanou** @c\_stefanou · 5h

Replying to [@1ParliCounsel](#) [@ParliCounsel\\_UK](#) and 3 others

I'm sorry I missed this one but our Legislative Drafting Course started today.

1



**Claire Fife** @Tinkinswood · 1h

Replying to [@1ParliCounsel](#) [@ParliCounsel\\_UK](#) and 3 others

Well done [@Lenorbury](#) and [@mattwadd](#) - wish I could have been there (Stage 3 on our Legislation Bill meant otherwise). Looks like a great event

## Commonwealth@70

As you might be already aware this year [2019] marks the 70th anniversary since the [London Declaration](#) was signed thus establishing the modern Commonwealth of Nations.

### **THE LONDON DECLARATION OF THE COMMONWEALTH PRIME MINISTERS, APRIL 28, 1949**

The Commonwealth is one of the world's oldest political association of states. Its roots go back to the British Empire when some countries were ruled directly or indirectly by Britain. Some of these countries became self-governing while retaining Britain's monarch as Head of State. They formed the British Commonwealth of Nations.

In 1949 the association we know today, the Commonwealth came into being. Since then, independent countries from Africa, the Americas, Asia, Europe and the Pacific have joined the Commonwealth. Membership today is based on free and equal voluntary co-operation. The last two countries to join the Commonwealth - Rwanda and Mozambique - have no historical ties to the British Empire. Various events and activities are planned, and CALC itself is considering what it can best do, to celebrate the Commonwealth@70.

The Commonwealth Secretariat held a Garden Party at Marlborough House on Friday, 14 June 2019, to celebrate the 70th Anniversary of the Commonwealth. Accredited Organisations such as CALC were invited to send a representative to attend the event. CALC's first Immediate Past President, Brenda King, kindly agreed to represent CALC at this event.



The Commonwealth



Commonwealth Secretary-  
General Rt Hon Patricia  
Scotland QC (2016 - to  
present)



**CALC**

COMMONWEALTH ASSOCIATION  
OF LEGISLATIVE COUNSEL

## New CALC members

### New members since February 2019

The following have been recorded as members of CALC (a) since the publication of the last edition of the *CALC Newsletter* (in February 2019), and (b) as at 25 June 2019.

Name	Country
<b>Bibrowicz, Phillipe</b>	Australia
<b>Vaurasi, Lyanne Selina</b>	Fiji
<b>Botha, Gladys</b>	South Africa
<b>Dovo, Angelyne Glenda</b>	Vanuatu
<b>Gordon, Wendy</b>	Canada
<b>Mohammed Hassan, Ibrahim</b>	Nigeria
<b>Bridges, Paul</b>	United Kingdom
<b>Lancey, Natalie</b>	United Kingdom
<b>Newton, Shaquille Kemar</b>	Barbados
<b>Koontse, Tumelo Ashley</b>	Botswana
<b>Andrew, Zach</b>	New Zealand
<b>Mavhuthugu, Tshifhiwa</b>	South Africa
<b>Williams, Clara</b>	South Africa
<b>Nombi, James</b>	Kenya
<b>McDonald, Renee</b>	Jamaica
<b>Livingstone, Edward (Ted)</b>	Canada
<b>Wirz, Daniel</b>	Canada
<b>Coyle, Christopher</b>	Scotland
<b>Latchmansingh, Chantelle</b>	Trinidad and Tobago
<b>Mguni, Beulah</b>	Botswana
<b>Mokgothu, Tshepo</b>	Botswana
<b>Mothoka, Nametso</b>	Botswana
<b>Schorah, Alexandra</b>	Canada
<b>Atsu, Sena</b>	Ghana
<b>Tso, Chi Yuen</b>	Hong Kong
<b>Mohamed, Mwinyi</b>	Kenya
<b>Sialai, Faith</b>	Kenya
<b>Tsuma, Winnie</b>	Kenya
<b>Adedibu, Hakeem</b>	Nigeria
<b>Illah, Anthony</b>	Nigeria
<b>Olivier, Nic</b>	South Africa
<b>Kaudha Bamwise, Tabitha Marie</b>	Uganda

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Name	Country
Tamale Mirundi, John	Uganda
Boileau, Hugh	United Kingdom
Burki, Assad	United Kingdom
Carlyle, Alison	United Kingdom
Cook, Samuel	United Kingdom
Harris, Jackie	United Kingdom
Ngochindo, Christiana	United Kingdom
Parke, Genevieve	United Kingdom
Bwalya, Mwenya Kaela	Zambia
Siu, Ngai Fan Marie	Hong Kong SAR
Webber, Scott Chapman	Canada
Kamperis, Michail	Cyprus
Ho, Kenneth	Singapore
White, Shona Paxton	United Kingdom
Wigzell, James	United Kingdom
Wright, Michael	Australia
Kanampiu M'Rithaa, Murithi	Kenya
Seria, Shehnaz	South Africa
Thomas, Valerie	Portugal
Debakeme, Christopher Ogbu	Nigeria

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## Secretary Contact Details

To contact CALC's Secretary, Ross Carter, about membership or any other CALC matters (for example, to suggest or send items for this *CALC Newsletter*), email: [ross.carter@pco.govt.nz](mailto:ross.carter@pco.govt.nz)



**REFORMATIVE LEGISLATION. NEW LEGISLATION.**

**Much Needed Legislation. ADVANCED LEGISLATION.**

(Old New Zealand newspaper headlines — courtesy of [Papers Past](#))