

Commonwealth Association of Legislative Counsel

THE LOOPHOLE



February 2020 (Issue No. 1 of 2020)

THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

Issue No. 1 of 2020

Editor in Chief – John Mark Keyes

Editorial Board – Therese Perera, Bilika Simamba, Wendy Gordon, Joanne Kellerman, Yen Mascarenhas

CALC Council

President – Geoff Lawn, Parliamentary Counsel, Western Australia

Past-president – Brenda King, First Legislative Counsel, Northern Ireland

Vice President – Katy LeRoy, Parliamentary Counsel, Queensland

Secretary – Ross Carter, Parliamentary Counsel, New Zealand

Treasurer – John Mark Keyes, Sessional Professor, University of Ottawa, Canada

Council Members –

Md. Jakerul Abedin, Joint Secretary, Legislative and Parliamentary Affairs Division, Bangla Desh

Michelle Daley, Senior Legislative Counsel, Cayman Islands

Angeline Dovo, Parliamentary Counsel, Vanuata

Wendy Gordon, Deputy Law Clerk and Parliamentary Counsel, House of Commons, Canada

Adrian Hogarth, Parliamentary Counsel, Office of Parliamentary Counsel, United Kingdom

Lucy Marsh-Smith, Principal Legislative Drafter, Jersey

Andrew Nkunya, Permanent Secretary – Legislative Drafting, Zambia

Johnson Okello, Director, Legal Services, The Senate, Kenya

Therese R. Perera, P.C., Specialist in Legislation and Legislative Drafting/ Retired Legal Draftsman, Colombo, Sri Lanka

Lynne Vaurasi, Deputy Chief Law Draftsperson, Fiji

Editorial Policies

The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

Submissions and other correspondence about *The Loophole* should be addressed to —

John Mark Keyes, Editor in Chief, *The Loophole*,

E-mail: calc.loophole@gmail.com

Copyright

All rights are reserved. No part of this publication may be reproduced or transmitted without the permission of the holders of the copyrights. Unless otherwise stated, copyright is held by the authors of the published material. This restriction does not apply to transmission to CALC members or to reproduction for that purpose.

Disclaimer

The views expressed in the articles contained in this issue are those of the contributors alone and do not necessarily reflect those of the CALC Council.

Contents

Editor's Notes	1
A Computer Language Model for Digitising New Zealand Statute Law	
A.J. Kelly	2
Student Experience of Studying Legislative Drafting Online at Athabasca University	
Mohamed Ally, Dale Dewhurst, Godson Gatsha, and Archie Zariski.....	26
Translating Policy into Law: A Case Study of Ghana's Social Protection Legislation	
Estelle Matilda Appiah.....	56
Plain Language and the Rule of Law: King Sejong the Great and Modern Legislative and Regulatory Drafters	
Michelle Johnson-Weider	67
The Practicality of Purposivism: <i>Smith v Selby</i>	
Yasmin S. Brewster.....	84
Book Review	
<i>Legal Usage: A Modern Style Guide</i>	91

Editor's Notes

This issue continues the publication of papers from the 2019 CALC Conference in Zambia. It also includes articles dealing with topics beyond those of the conference as well as a review of new reference work that should prove useful to those who draft in English.

We begin with Adrian Kelly's article dealing with the digital transformation of legislation into computer code. His article complements Matthew Waddington's published in the previous issue on this emerging topic of "law as code". Adrian walks the reader through the steps of transforming legislation into computer programs (apps) that answer questions about what the legislation requires.

Next, we turn to a topic that never really goes away: providing training on legislative drafting. Mohamed Ally, Dale Dewhurst, Godson Gatsha, and Archie Zariski describe a study they conducted based on surveys of students in the Legislative Drafting Program at Athabasca University in Canada. The resulting findings relate to the impact of new technologies on legislative counsel, how to employ technologies and design pedagogies that will allow legislative counsel to keep up to date and how to design and develop legislative drafting training materials that meet the specific needs of legislative counsel.

This issue then moves beyond the CALC Conference beginning with Estelle Appiah's account of translating policy into law in drafting social protection legislation in Ghana. Her article charts the course taken to secure social protection by law to ensure that a modern system of social protection has a significant impact on incomes, equitable development and increased access to social services for the extreme poor and vulnerable in Ghana. It also takes into account the qualities required for a good draft law.

Next, Michelle Johnson-Weider takes us into the world of a 15th century Korean king to link the rule of law to comprehensible legislation. She goes on to examine her experience with plain language as a nonpartisan legislative and regulatory drafter in the United States. She encourages legislative counsel to take every opportunity to make the law easier to read and understand.

Finally, Yasmin Brewster looks at the emergence of purposivism as an approach to interpreting legislation in the Caribbean. This approach is particularly suited to dealing with legislation that has not been updated to take account of changing social realities, notably those relating to family relationships.

This issue concludes with Bilika Simamba's review of Peter Butt's *Legal Usage: A Modern Style Guide*. Bilika provides a very helpful survey and of its contents and recommends it as "a treasure trove of references for the student or practitioner."

John Mark Keyes
Ottawa, January, 2020

A Computer Language Model for Digitising New Zealand Statute Law

A.J. Kelly¹



Abstract

This article describes a structured legislative language which can be translated transparently and automatically into a computer language. This structured language, in the form of a computer language is the language of an algorithm that may be utilized for computing the outcome of a series of ‘legal’ datapoints. The outcome is a law, conceptualized as a personalized obligation, or personalized freedom from obligation.

Table of Contents

Introduction	3
Building Blocks.....	7
Decision Trees, Computer Language and Drafting	9
Computer Language Framework and Grammar.....	11
Identifiers for “Laws”, Modules, “Rules”, and Logic Blocks	12
Values.....	14
Logic Block Syntax.....	15
Operators	19
Quantification Logic Block Drafting Patterns	24
Appendix.....	25

¹ Senior Legislative Counsel for the New Zealand Government and a director of SmartLegal Limited, a limited liability company specialising in delivering code as law.

Introduction

George Coode's heroic mid-19th century efforts to professionalize legislative drafting and make plain statute law still resonate, even though you would have to say, with the benefit of hindsight, that much of what he wrote was ignored for the first 100 years or more.²

Looking forward, past Victorian England, to universal suffrage, post-WW II social democracies, and Garth Thornton (a New Zealander),³ we can find Coode near the centre of a plain English renaissance in the latter part of the 20th and the beginning of the 21st century speaking of "Legislation for the people", as a synonym for plain English, as a product of professional drafting expertise.⁴

"Plain English" is still the central theme of modern Parliamentary legislative drafting in New Zealand in the early 2000s. But a new paradigm is emerging: law for computers. From "plain English legislation for the people", through "ease of use" to "computer code as law" is a short journey. There is no need for me to join the self-evident society-wide dots in our early 2000s world to support such assertions as I am making.⁵

The qualitative assertion of this paper is that legislation written as computer code, or perhaps more accurately, algorithmic models of statutes of the type presented in this paper, fall somewhere on a continuum, from "no worse than current representations of statute law" to "at least as good as, if not better than, current representations of statute law".

What I propose is to describe a structured language which can be translated transparently and automatically into a computer language. This structured language, in the form of, effectively, a computer language itself, is the language of an algorithm that may be utilized for computing the outcome of a series of 'legal' datapoints.⁶ The outcome is the existence or

² George Coode, "On legislative expression", reprinted in Elmer A. Driedger, *The Composition of Legislation: Legislative Forms and Precedents*, 2d ed. (Dept. of Justice: Ottawa, 1976) at 353:

... it is a matter of astonishment that expressions so intricate as those in which the law is now ordinarily expressed can ever be brought to grammatical close. It requires the most consummate skill in language to interweave cases, conditions, subjects, and actions, with all their limitations, exceptions, qualifications and consequences into one sentence; and when it is considered that this is sometimes done in a phraseology which is not English, it passes comprehension how the draft[er] could ever get through [their] task.

³ In every edition of Thornton's standard text on legislative drafting, a section is dedicated to Coode's legislative sentence. Also, of relevance to this paper, Thornton discusses the diagrammatic representation of statute as either an aid to the drafter (as part of the drafting process) or as law itself (also known as an aid to the reader): H. Xanthaki, *Thornton's Legislative Drafting*, 5th ed. (Bloomsbury Professional: West Sussex, 2013) at 6-24 and 189-90.

⁴ George Coode, above n. 2 at 321, asserted that

It is beyond a doubt that many of the more positive errors and gross defects of legislation are to be prevented by observing a very few intelligible and simple rules, which any person capable of dividing grammatically a sentence in [their] native language would be competent to apply.

⁵ Irwin Chaselow wrote several articles on the theme of machine language / law language in the early 1960s: <http://journals.sagepub.com/doi/pdf/10.1177/000276426100400709>

⁶ See below the section Computer Language Framework and Grammar for an explanation of a 'legal' datapoint.

non-existence of a law, conceptualized as a personalized obligation, or personalized freedom from obligation (the two are the same).

I have used two evaluative criteria in designing the structured language: transparency and isomorphism. It is important that the structured language support both of these criteria. The criteria are closely related and discussed more fully later. Transparency is a function of the code's form, such that logic flows in the algorithm can be seen and checked. Isomorphism is a qualitative criterion: does the translation of legal effect 'measure the same' in both languages (are statute and code *legally* the same, even after applying the different grammatical / syntactical / interpretative rules to the TEXT of each)?

The reason that transparency and isomorphism are important is related to utility. However, utility is not just usefulness as law, or as digital law, but rather usefulness in the process of designing, passing, and implementing law. Process issues are beyond the immediate scope of this paper, but in fact, the whole point of this paper is to develop a tool that can be used in the fast-paced policy / drafting / service delivery environment that is now expected and demanded in modern democracies.

Theoretically, assuming that statute law is a structured language per se, there is an algorithm for the truth conditions of a law.⁷ However, a "complete" set of interpretative rules for any single law carries with it the risk of incompleteness. And there is possibly no way to know whether or not the algorithm is complete in terms of logic, except by human judgement. And this is on top of the question of to what degree in fact statute law is a structured language.

In my view, law itself is a structured language to *some* degree. Exhortative statutes contain truth evaluative propositions, if only at the existential level, according to Andrei Marmor.⁸ Marmor does, however, appear to end up supporting conditions as propositional content for law and appears to posit self-referential conditions as a basic material for exhortative statements in the law a.k.a. statute. This gives rise to a domain-specific solution in need of a further set of truth conditions in my view and, I think, in Marmor's view. And that set of truth conditions needs a further set: a kind of infinite recursion.

So, to summarize, assertions of self-referential conditions would appear to be legal domain-specific basic entities. Laws are conditional, with truth evaluative content, either existentially or pragmatically.

At this point, in computing terms, some people would point to the problem inherent in a computer's non-human awareness, if indeed an algorithm can ever be called aware:⁹ Can a

⁷ I think this is the conclusion that can be drawn from Rudolph Carnap's seminal paper "[Testability and Meaning](#)". (1937), 4 *Philosophy of Science* 419.

⁸ Andrei Marmor, *The Language of Law*, (Oxford University Press: Oxford, 2014), Chapter 3.

⁹ The basic thrust of Roger Penrose's excellent book *The Emperor's New Mind* (Oxford University Press: Oxford, 1989) is that there is no algorithm known (and quite possibly ever knowable!) for human awareness.

computer ever really “know” what a dog is, or what is “fair”, let alone complex contextual issues requiring knowledge of social rules or even what is “a dog” or “fair” in the actual legal domain. So, in terms of Marmor’s analysis: is there ever an algorithm for self-referential domain-specific conditions? Is there an algorithm for legal awareness?

In my view the above do not represent a fundamental objection to algorithmic law. Indeed, my working assumption is that despite the likelihood that a set of interpretative rules is incomplete as matter of theory, and even accepting that domain-specific knowledge that has hitherto been seen as the domain of human “legal awareness” is actually *theoretically necessary*, nevertheless *in practice* an algorithm will be “good enough” for use as a law. But it is the description and evaluation of the practice that then becomes paramount. It is the process in which the algorithms are created and used which really ensure that they are “good enough”, rather than any strict logical criteria. In the end, human judgement in the form of awareness is the true evaluative criteria. But not a fundamental objection.

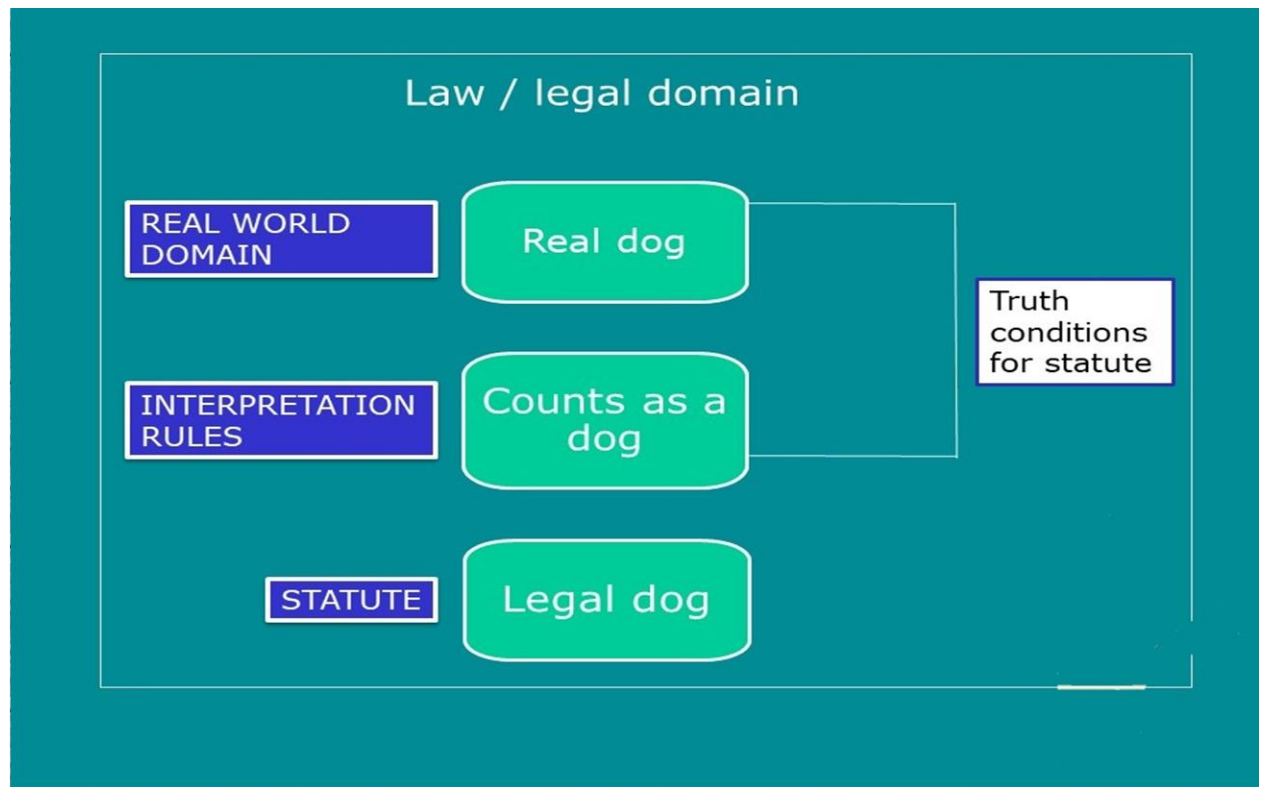


fig 1. Truth conditions in the legal domain

Interpretation rules, in the form of ‘what counts as a particular legal fact’, coupled with the world of non-legal facts (for instance ‘a real dog, called Rex’) can be viewed as the truth conditions for the existence of a particular law in application. This is a conceptual extension

Human awareness may partake of non-algorithmic functionings unknown and unknowable in the sense of algorithmic awareness.

of Marmor's analysis of truth evaluable content. Truth evaluable content of the law is self-referential and personal, as a function of being exhortative statements in the legal domain. Even "real world" facts as truth conditions for legal syllogisms are therefore within the legal domain by implication. Legal awareness is the minimum requirement, therefore, for understanding and evaluating legal syllogisms.¹⁰

Given that rules of interpretation are *legal rules*, you can see an "infinite" nest of truth conditions (a kind of infinite recursion); "What counts as a 4-legged animal that barks?" "What counts as barking?" Theoretically, at some point you simply get to "a dog is a dog, and that is the subject matter of the law". That is not susceptible to being an algorithm per se, since it resides at the level of human understanding, potentially: "It's fair if it's fair, and that is the subject matter of the law". But nevertheless, a 'good enough' algorithm is theoretically available, even if it doesn't definitively, necessarily, match the actual answer human awareness would give: So long as human awareness can evaluate the 'good enough' algorithm, then, despite a completely different awareness from a human's awareness or understanding of "a dog", we have an algorithm acceptable as a representation of the relevant legal domain object.

So, human legal awareness is actually a necessary part of, or pre-condition for, algorithmic law. It is unsurprising that algorithmic law is process-driven with human input! And, in fact, this represents the current state of play, really. When a drafter uses the naked word "fair" in English, what counts as fair is immediately and promptly in need of clarification!

One salient point to take from this analysis, and Marmor's, is that George Coode intuitively posited a basic but somewhat conceptually similar theory for statute law over a hundred years ago. Coode's analysis is discussed below. My contribution is to, hopefully, extend Coode's analysis into the digital world, taking into account the impact of Marmor's speech act / truth condition analysis (which in itself bears some resemblance to deontic logic truth condition analysis), to provide a complete framework for creating 'good enough' algorithmic statutes.

In real terms, as intimated above, it is the process of creating algorithms that humans (and not algorithms) judge to be "good enough" that enables the existence of algorithmic law. So, in the context of algorithmic law, it is human judgement as to transparency and isomorphism that guarantee utility, not algorithmic law itself. Having algorithmic law running symbiotically in the process channels for policy making, drafting, and service delivery is, in my view, a necessary pre-condition to its existence. And, interestingly, algorithmic law requires and allows innovative changes in those process channels.

So, against a backdrop of innovative changes in policy making, drafting, and service delivery, my language is designed to give a framework for transparent, isomorphic digital

¹⁰ Marmor uses an interesting analogy with real world facts being incorporated into fictional works, as part of speech act participants' awareness and understanding of the relevant domain.

law that can be used practically (with a suitable technological implementation) in the business of law making and delivery.

Building Blocks

My computer language model has two major building blocks. The first is Coode's legislative sentence as described by Thornton's standard text on drafting, namely a subject / predicate, being a legal outcome, is the object of one or more pre-conditions:

55. Cutting down plants

A person (subject)

May cut down plants, if (predicate)-

the plants are a **stand of timber** (precondition); and

the plants are unprotected bush (precondition).

fig 2. Coode's legislative sentence (via Thornton).

As a template, Coode's legislative sentence is apt for any matter of law or fact, so that it can be used "recursively" or modularly to represent complexity in statutes, for example: defined terms. Intermediate predicates can be used to test for intermediate legal matters and factual matters: **"Does a "stand of timber" exist as a matter of law for the purposes of the section 55"**.

Intermediate predicate (a definition)

A stand of timber (subject)

Exists as a matter of law, if (predicate)-

The plants form a pinus radiata plantation (precondition) :

The plants form a group designated geographically by the Forester-General (precondition).

fig 3. Intermediate predicate using Coode's legislative sentence.

The other major building block is the theoretical assumptions as to the logic of statutes canvassed in the introduction to this paper. To elaborate, Coode's legislative sentence is determinedly "first order" logic¹¹, and implicit in it, and indeed within statute law generally, there are no instances of formally indeterminable matters of law or matters of fact. There is always an answer, but whether it is the right answer or not is a matter of interpretation. Statute law as a series of "exhortative statements containing truth evaluative propositions" is naturally expressible in terms of syllogisms. Completeness may be an issue, and so may

¹¹ By "first-order logic" I mean logic based on simple non-deontic first order operators like "and", "or", "not". And using "true / false".

whether or not the algorithm is ‘good enough’ in the case of self-referential syllogisms, but no instances of formally indeterminable propositions exist.

While the position of “no formally indeterminable matters” looks like a hard positivist or formalistic position, it is an acceptable assumption in the context of formal representation of law, such as statute, and in any case it is not a foundational building block. Rather, the foundational building block is the assertion that extending Coode’s “first order” logic to *intermediate predicates* requires, in the main, more “first order” logic: **If matter of law 1 (stand of timber / intermediate predicate 1) AND matter of law 2 (unprotected bush / intermediate predicate 2) THEN matter of law 0 (cutting down allowed under section 55 / main predicate 1).**

The point is that *intermediate predicates* have their own preconditions, and conform to Coode’s legislative sentence, in the main. “What counts as a legal fact” is a legal rule itself.

It is the intermediate predicates which provide ‘good enough’ algorithms, and a way to navigate the problem of self-reference and human legal awareness.

At bottom, it is my thesis that statute law can be adequately represented as a series of yes / no¹² decisions as to the existence of facts and law satisfying “the pre-conditions” of every statutory rule. And ... that such a representation can be coded for a computer without loss of meaning, and, therefore, without loss of ‘legality’¹³, using only first order logic. Of course, “without loss of meaning”, and “without loss of ‘legality’” are assertions as to the qualitative isomorphism criteria... and applying them to “the pre-conditions” begs some form of art from the framer of the pre-conditions: What is “good enough” as a set of pre-conditions for a particular algorithmic law?

That question is worth asking, as a drafter; as is considering the law as a series of yes / no decisions. As a matter of practice, awareness of algorithmic law can and should inform our English drafting.

¹² Quantification of “liability” is a secondary but important consideration.

¹³ The question of whether a computer code representation of a statute is ‘the same’ as an English statute representation is a matter of law. If, in the case of a statute, we conceive of the law (or legal effect) to be a matter of interpretation of the representation we are presented with (treating facts as a given), then it is that dimension of ‘legal equivalence’ which is the ultimate evaluative criteria for the ‘legality’ of a computer code representation. The equivalency of code and statute is known as ‘isomorphism’, borrowing a mathematical term that describes two objects as being the same if the individual transform methods used in their creation are indistinguishable from each other if measured using an agreed measure. If computer code and statute law ‘measure’ *the same* in the dimension of legal effect (i.e. the interpretation of code and statute result in the same law), they are isomorphic. The term “isomorphism” in the context of computer code representations of law was championed in T. J. M. Bench-Capon and F. P. Coenen, “Isomorphism and Legal Knowledge Based Systems” (1992), *Artificial Intelligence and Law*, at 65 – 86. In this article, correspondence between source material and computer data was extolled and labelled “isomorphism”. My paper adopts the term with a slightly different meaning (implicit in Bench-Capon and Coenen’s meaning): correspondence between legal effects.

Indeed, a premise of this paper is that we should have a weather eye for good legislative design “from the get-go”, as an enabler for algorithmic law.

Decision Trees, Computer Language and Drafting

A series of yes / no questions glued together with first order logic is a “50/50 decision tree”. Decision trees appear to have gained currency during the 1930s as part of military operational research. Basically, the computer language model I present is the basis for an algorithm for coding and executing decision trees. So, in this way, if we allow that a statute can be legally (isomorphically) represented by a 50/50 decision tree, then, as described in this paper, it can be represented by isomorphic computer code.

Thinking about a percentage chance of a person being liable¹⁴ under a statutory law, we must distinguish between a statistical model of *interpretation* (which does not need to be modelled in a *representation* of a statute at all), and *quantification* of liability (which can be adequately modelled in a computer language): In terms of the computer language model presented in this paper, the existence of a quantity, such as an amount of money or a sentencing tariff, is no different from the existence of any other matter of law or fact. The quantity is a simple Coodean predicate. And, simple arithmetic is usually all that is required to quantify a predicate denominated in money or years (for example).

The language I propose takes a legislative sentence à la Coode and models it using an approach focused on “Laws”, modules, “rules” and logic blocks, and incorporating simple arithmetic where quantification is required. A simple (non-quantification) example might be helpful:

```
LawPlantCutting = “A person may cut down plants”;  
LawPlantCutting.module0 = “May the person cut down plants?”;  
LawPlantCutting.module0.rule1 = "Are the plants a stand of timber?";  
LawPlantCutting.module0.logicblock0 = if (rule1 == true) then logicblockBush, else  
return false;  
LawPlantCutting.module0.rule2 = "Are the plants unprotected bush?";  
LawPlantCutting.module0.logicblockBush = if (rule2 == true) then return true, else  
return false;
```

fig 4. Example of computer language model.

The computer language example in fig 4 models the Coodean legislative sentence in fig 2.

¹⁴ “Liable” is used here, and subsequently in the paper, as a surrogate for any matter of law or fact, as a main predicate or as an intermediate predicate.

The way the computer language model 'works' is by encoding a decision tree derived from the legislative sentence. It is that decision tree that is the missing link between the computer language in fig 4 and the English representation of the law in fig 2:

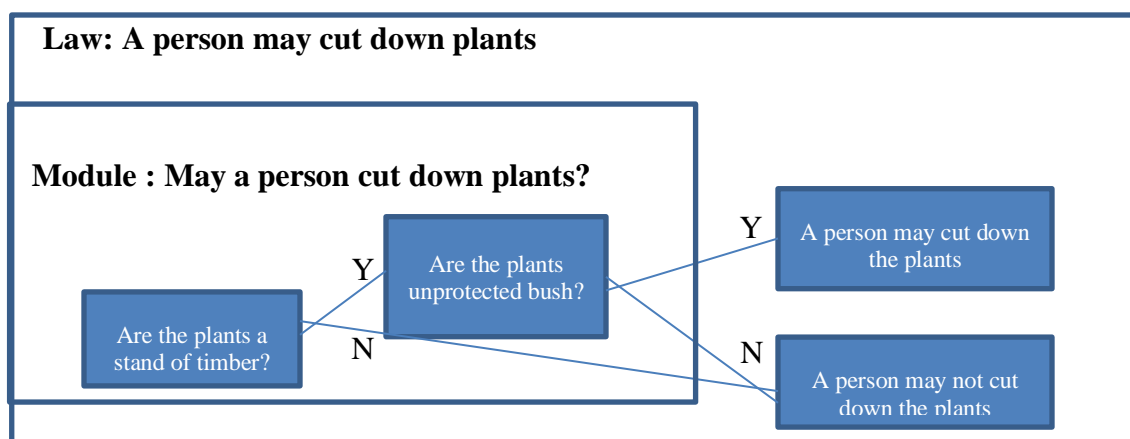


fig 5. Decision tree for figs 2 and 4.

The use of decision trees also has much to commend itself to drafting practice, and, indeed, to the policy design and formulation process.

My experience of taxation policy design and formulation leads me to believe that decision trees and similar diagrammatic representations could be usefully employed in many policy development processes. They could be profitably used as central “living” documents in an integrated policy and drafting design and formulation process¹⁵.

To return to, and conclude this introduction with, the theme of evaluation: Like any ‘foreign’ language, the proposed computer modelling language has grammatical rules that must be adhered to. In explicating them, I hope to show its ability to fully express statute law.

There are always difficulties. Basically, poorly designed legislation translates into a computer code representation of that obfuscation.

Having legislation written in clear Coodean legislative sentences, and designed with modularity in mind, would make computer language modelling easy, and the resultant computer code representations more useful than ones based on obfuscated legislation. But the basic reason for that is, in fact, that clear Coodean legislative sentences and modularity are both paradigms for better *English* representations of statute.

¹⁵ Integrating policy, drafting, and digital service delivery, using diagrams and other aids as ‘living documents’, with a focus on end-to end processes and machine consumable rules, was the subject of the *Better Rules for Government* 3-week “sprint”. The “sprint” was led by the New Zealand Department of Internal Affairs and reported in the “*Better Rules for Government Discovery Report*”, March 2018, Digital.govt.nz.

<https://www.digital.govt.nz/showcase/better-rules-for-government-discovery-report/>

Also, some law is simply declarative, such as honours. Nevertheless, even declarative law can be expressed algorithmically. As a speech act, you must “honour the honour”! So, in terms of Marmor, there is a simple existential question of whether the honour exists in the legal domain. This in itself is an algorithm: “**If** you look in the law, and see an honour exists, **then** you must honour the honour”.

Computer Language Framework and Grammar

A basic premise of this paper is that for an English statute, there is a set of datapoints, connected by first order logic, that adequately represents the legal effect as the English statute. An example of a datapoint is (in bold): `LawPlantCutting.module0.rule1 = "Are the plants a stand of timber?"`;

The formal description of the structured language composed of the datapoints and the “first order” logic is the grammar for a computer language model. The grammar, then, if the premise is correct, represents a translation layer that is in some ways jurisprudentially part of a ‘correct’ or isomorphic interpretation of a statute in terms of computer code and the English statute.

Isomorphism (and the related term *homomorphism*) is useful to describe the mapping of transformations used to translate between languages.

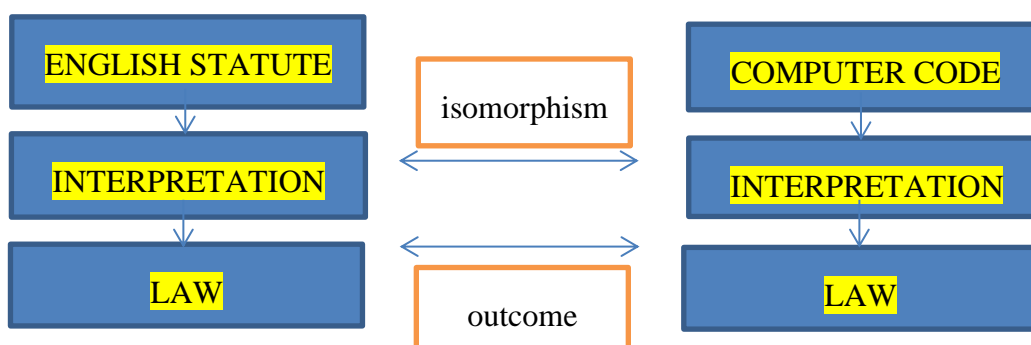


fig 6. Isomorphism

English statutory interpretation is a homomorphism that maps (from top to bottom in fig 6) the intention of law makers, expressed in the form of English statute, to the law per se. The facts are simply an unchanging constant.

Computer code can be interpreted to be the law, too, if it is first recognised as law by the appropriate constitutional means, of course. The question is whether the outcome of the interpretation (the legal effect) is “the same”, and the statute and code are, therefore isomorphic¹⁶.

¹⁶ In this sense (equivalency of translation process outcome measured in terms of legal effect) the use of “isomorphism” in this paper is the same as in Bench-Capon and Coenen’s paper. See above n.13.

To the extent to which the datapoints are purely re-written statements of English statute then equivalency (or not) of legal effect is self-evident, being a function of English drafting re-write quality. So, the process of interpretation is not, for the datapoints, a question of “foreign language” interpretation. However, when coupled with the digitization of statute formalisms proposed below (e.g. ‘and’, colon, “; or”, see below) and the grammatical requirements of digitization using computer language, a level of complexity arises that requires absolute transparency to enable evaluation. As discussed above, given the need to incorporate, where necessary, human legal awareness as part of an isomorphic or ‘good enough’ algorithmic law, transparency becomes the prime virtue and evaluative pre-condition for the utility of, and indeed, the isomorphism of, any algorithmic law.

It is my hope that the simple framework and grammar described here is transparent enough to enable isomorphic algorithmic law.

The grammar is based on a framework of linked lists of datapoints, organized into “Laws”, modules, and “rules”, all linked by logic blocks.

A “Law” is made up of a series of statements, each terminated by a semi-colon (see fig 4 above for example). The statements provide, for a “Law”, the modules of that “Law”, and the “rules” and logic blocks that, in turn, make up the modules.

I cannot stress enough the importance of thorough analysis of English statute, preferably in the format of decision trees (which mirror the organization of the framework’s datapoints, see fig 4 above). Indeed, as a means to understanding and using my language model, decision tree diagrams are very useful.

Further, the drafting of the English is inseparable from the creation of a computer language model, as you would expect in the case of isomorphic statute and computer code.

Legislative design patterns are also front and centre in explicating the translation of English statute drafting into the structured language model, and in enabling the evaluation of the legal effect of the computer code.

Indeed, the drafting of the datapoints is a key ingredient for my computer language. It is their legal interpretation that is integral to the legal effect of an algorithmic law; because the datapoints are, in the main, in plain English, (rewrites of law, retaining meaning, interpretation and effect), the usual legal interpretative rules apply, as intimated above. The transparent evaluation of the datapoint is key to evaluation of isomorphism.

Further, turning things on their head, I think it can be contended that some of the discipline inherent in the use of the computer language grammar / framework is wholesome for English drafting practice per se.

Identifiers for “Laws”, Modules, “Rules”, and Logic Blocks

There are four basic units for the language: “Laws”, modules, “rules” and logic blocks. Each element has a different identifier (see fig 7 below), with modules being the ‘superset’ for

logic blocks and “rules”, and ‘Laws’ being the ‘superset’ for modules. In other words, a module has ‘rules’ and logic blocks, and ‘Laws’ have modules:

```

LawPlantCutting = “A person may cut down plants”;
LawPlantCutting.module0 = “May the person cut down plants?”;
LawPlantCutting.module0.rule1 = "Are the plants a stand of timber?";
LawPlantCutting.module0.logicblock0 = if (rule1 == true) then logicblockBush, else
return false;

```

fig 7. Example of identifiers (to the left of the outline).

The identifier for a “Law” (i.e. **LawPlantCutting**) must start with the word **Law**, with a capital **L**, and can have any other labelling text desired, so long as there are no spaces (**LawApplicationHorseLiability** is valid).

Stating the “Law” (by using ... **LawX** = “**LAW STATEMENT**” see fig 7 above) is to state the final or uppermost predicate, to which the modules, “rules”, and logic blocks below all contribute, to answer the legal existential question ‘does this “Law” exist on the case?’.

Each “Law” has to have a minimum of one module, and one of those modules (the first one executed) must be identified as **module0** ... **module0** is the first module and the one that provides the answer, effectively, for the question of liability implied by the “Law” (see fig 7 above): A “Law” **The person must go to jail** (**LawJail** = “**A person must go to jail**”); requires a **module0** along the lines of **LawJail.module0** = “**Must the person go to jail**?”;. Modules that are not **module0** can have any identifying text, so long as the identifier starts with **module** and has no spaces in it (**LawJail.moduleOffence** is valid. So is **LawJail.module1**). Note the lowercase **m** for **module**.

Each module must have a minimum of one logic block, and the first logic block executed must be identified as **logicblock0**. Logic blocks that are not **logicblock0** can have any identifying name, so long as the identifier starts with **logicblock** and has no spaces in it (**LawJail.moduleOffence.logicblock1** is valid)¹⁷. Note the lowercase **l** for **logicblock**.

“Rules” are similarly identified to modules (except there is no rule0): “Rules” can have any name, so long as the name starts with **rule** and has no spaces (**LawJail.moduleOffence.ruleHomicide** is valid). Note the lowercase **r** for **rule**.

Note the use of fullstops in the identifiers (see fig 7 above). There is no fullstop in a “Law” identifier, one fullstop in a module identifier, and two in each of the “rule” and logic block identifiers.

¹⁷ Note that logic block identifiers (and ‘rule’ identifiers) must be unique to a module, but different modules may have identically identified logic blocks and ‘rules’. This is fleshed out further in the discussion of logic block syntax below.

Values

Each module has a value. Setting a module's value allows that value to be used by other modules (or in the case of **module0**, used by the "Law"). In this way intermediate predicates (as introduced above) can be modelled: Layers of modules model multi-layer "deep" decision trees.

Every module has a value type. There are three value types: "TRUE/FALSE", NUMBER, and DATE. For **module0** the value type is "TRUE/FALSE" for a non-quantification "Law", since the function of a non-quantification "Law" is, in effect, the provision of a yes or no answer to the question of application or existence of the "Law". However, it is possible that the relevant law is the existence or non-existence of an amount. In that case of a quantification law, **module0** has a value type of NUMBER.

Modules that are not **module0** can be set to any one of the three value types.

Note that "rules", as questions requiring user data¹⁸, accept the three value types: "TRUE/FLASE", NUMBER, and DATE. Rules are set to the relevant user data value, and it is those values that are used, in logic blocks, to give the associated module its value. What type of data a particular rule accepts is implementation dependent, and not set in the grammar.

Setting / assigning module values

The values of modules are assigned (or 'returned') in logic blocks: In a module's logic blocks, the values of 'rules' and of other modules may be combined in *expressions*, with the results being assigned to the module in which the relevant logic block resides, as a *return value*. Logic blocks and how they combine values are discussed fully below, but it is worth looking ahead to the grammar that is used to assign a value to a module using a logic block ... A value is assigned to a module (let us say **moduleX**) using the following syntax:

<pre>return true; return 100; return ruleAmount;</pre>
--

fig 8. Examples of giving a module a value

The first example in fig 8 is effectively saying, in terms of a Coodean legislative sentence, that, given **moduleX** is a question of application of law (for instance), not quantification, then **moduleX**'s predicate is true: "May the person cut down plants?" is true. **ModuleX** is set to "TRUE". "TRUE" is assigned to **moduleX**.

¹⁸ See Appendix.

The second example returns a predicate for a module X “What is the amount you have spent on lollipops?”, expressed in terms of a NUMBER. It could be expressed as in the third example: **return ruleAmount**, where **ruleAmount** is “What is the amount you have spent?”. In that way, user data for **ruleAmount** can be returned as the value of **moduleX**. It is important to note that where a module returns the value of a “rule”, it must be the value of a “rule” in the module. So if **moduleX** returns / is assigned the value of **ruleAmount**, **ruleAmount** must be in **moduleX**.

It is important to note that there can only be one type of return value for a *module*. So, one logic block of a module may not return “TRUE/FALSE” if another logic block of the same *module* returns a NUMBER. As discussed above, rules within modules can be of any of the three types “TRUE/FLASE”, NUMBER, and DATE.

In the examples in figure 8, what is missing is the full syntax for a logic block assigning a value to a module. Following is an example, before continuing on to more detail, showing the mixing of value types across modules: the value of \$100 might be assigned to **moduleX** (from user data submitted to a “rule” in **moduleX**¹⁹, i.e. assigned to **moduleX** in a **moduleX** logic block), and that value might be used in a logic block in **module0**:

```
...moduleX = “What is the amount you have spent on lollipops?”
...moduleX.ruleInitial = ‘have you spent money on lollipops?’
...moduleX.logicblock0 = if (ruleInitial==true) then logicblockQuant else return 0 //note
“0” is used, not false, since moduleX has only one return type NUMBER
...moduleX.logicblockQuant = return ruleAmount
...moduleX.ruleAmount = “what is the amount you have you spent?”
...module0 = “does the person go to jail?”;
...module0.logicblock0 = if (moduleX > 50) then return true, else return false;
```

fig 9. Example of a person going to jail for spending too much on lollipops (**moduleX.ruleAmount** = 100 use data)

Logic Block Syntax

Each module must have at least one logic block, and the first one to be executed is **logicblock0**.

In terms of Coode, a module’s logic blocks contain logical pre-conditions (‘rules’ and other intermediate predicates / other modules together with “first order” operators) and give rise to

¹⁹ The values for “rules”, used in logic blocks to assign module values, are provided as user data. The Appendix provides a JSON data interchange format for the provision of the values for “rules” to the current javascript implementation of the computer language model.

either the module's value, being, in effect, the module's predicate, or to the evaluation of another set of logical pre-conditions.

So, in general, logic blocks are composed of expressions / pre-conditions that are evaluated to give rise to a module's value, **or** the execution of another logic block in the same module, **or** the execution of another module, starting with the other module's **logicblock0**.

Logic blocks evaluate using “first order” operators. A table of operators, with drafting examples, appears as fig 10 below.

There are two types of logic blocks: “if condition” logic blocks and quantification logic blocks.

“if condition” logic blocks follow the pattern: **if (expression) then [outcome]**

```
LawPlantCutting.module0.logicblock0 = if (rule1 == true) then
logicblockBush, else return false;
...module0.logicblock0 = if (moduleX > 50) then return true, else return false;
...moduleG.logicblock1 = if (ruleC == true) then logicblock2, else
logicblockH;
```

fig 10. Logic block pattern examples with expressions in green and outcomes in blue.

“If condition” logic blocks

As has been intimated, expressions in “if condition” logic blocks are evaluated to give outcomes. There are three possible types of outcomes, a “return” outcome, a “return and call” outcome and a “call” outcome:

```
...module0.logicblock0 = if (moduleX > 50) then return true, else return false;
...moduleG.logicblock1 = if (ruleC == true) then logicblock2, else logicblockH;
LawPlantCutting.module0.logicblock0 = if (rule1 == true) then logicblockBush, else
return false;
```

fig 11. Logic block pattern examples with “return” outcome in red, and “call” outcome in yellow. Cyan is “call and return”.

An “if condition” logic block has to have an *outcome* that starts with **then**, and an **else** is mandatory, too. So is the bracketed expression to be evaluated

All three value types “TRUE/FALSE”, NUMBER, and DATE can be used within “if condition” logic blocks, for return values. However, there can only be one return type per

module. So, one logic block of a module may not return “TRUE/FALSE” if another logic block of the same module returns a NUMBER.

Quantification logic blocks

Quantification logic blocks use NUMBERS. All of the logic for them is contained in the outcome / logic block’s return value for the module, with no **if (expression) then** pattern, and no “call” outcome at all:

```
...logicblock0 = return ruleAmount;
...logicblock1 = return 100;
```

fig 12. Quantification block using NUMBERS.

“Accumulation syntax”, discussed below, allows for the conditional return of a *quantification* logic block, and so is a hybrid between “*if condition*” logic blocks and *quantification* logic blocks.²⁰

Scope

The two types of logic blocks can be mixed inside a module. But the rule against mixing *return* types in a module is still applies. Separate modules with different return types alleviates this ‘stricture’.

It is important to note that a module’s logic block cannot use “rules” that are outside the module. The logic blocks must use “rules” that are within the boundaries of the logic block’s module.²¹ As a consequence, logic blocks may refer to “rules” without their full identifier since a module’s logic blocks can only refer to rules within the same module:

```
LawPlantCutting.module0.rule1 = "Are the plants a stand of timber?";
LawPlantCutting.module0.logicblock0 = if (rule1 == true) then logicblockBush, else
return false;
```

fig 13. Scope of “rules” naming.

²⁰ See below Quantification Logic Block Drafting Patterns.

²¹ In the following “Law”, there is no **ruleL** in **module0**, and **moduleX.rule1** is a rule outside of **module0**, so **LawPlantCutting** below contains two grammatical errors:

```
LawPlantCutting = "A person may cut down plants";
LawPlantCutting.module0 = "May the person cut down plants?";
LawPlantCutting = "A person may cut down plants";
LawPlantCutting.module0 = "May the person cut down plants?";
LawPlantCutting.module0.rule1 = "Are the plants a stand of timber?";
LawPlantCutting.module0.logicblock0 = if (ruleL == true) then logicblockBush, else return false;
LawPlantCutting.module0.rule2 = "Are the plants unprotected bush?";
LawPlantCutting.module0.logicblockBush = if (moduleX.rule1 == true) then return true, else return
false;
```

Note that a logic block can only refer to a logic block in the same module, and does not need to use the full identifier for the other logic block:

```
LawPlantCutting.module0.logicblock0 = if (rule1 == true) then logicblockBush, else
return false;

LawPlantCutting.module0.logicblockBush = if (rule2 == true) then return true, else
return false;
```

fig 14. Scope of logic block naming.

Importantly, note that a module's logic blocks can use modules that are outside the module, but inside the "Law". This feature also allows separate modules' values to be used where different return value types require separation. Indeed, using modules inside of other modules is the key way to model "deep" statutory decision trees:

```
LawPlantCutting = "A person may cut down plants";

LawPlantCutting.module0 = "May the person cut down plants?";

LawPlantCutting.module0.logicblock0 = if (module1 == true and module2 == true) then
return true, else return false;

LawPlantCutting.module1 = "Are the plants a stand of timber?";

LawPlantCutting.module1.rule1 = "Are the plants a stand of timber?";

LawPlantCutting.module1.logicblock0 = if (rule1 == true) then return true, else return
false;

LawPlantCutting.module2 = "Are the plants unprotected bush?";

LawPlantCutting.module2.rule1 = "Are the plants unprotected bush?";

LawPlantCutting.module1.logicblock0 = if (rule1 == true) then return true, else return
false;
```

fig 15. Using modules' values inside modules.

A logic block can call another module, but this means that the module called from is not given a value. Potentially, infinite loops could result from calling a module that never has a value set because it is called from, so it is best to avoid that:

```
... module1.logicblock1 = if (rule1== true) then module2 else return true;
```

fig 16. Calling other modules inside modules.

The module called (**module2**) is executed starting with logicblock0.

A decision tree of fig 15 might be useful:

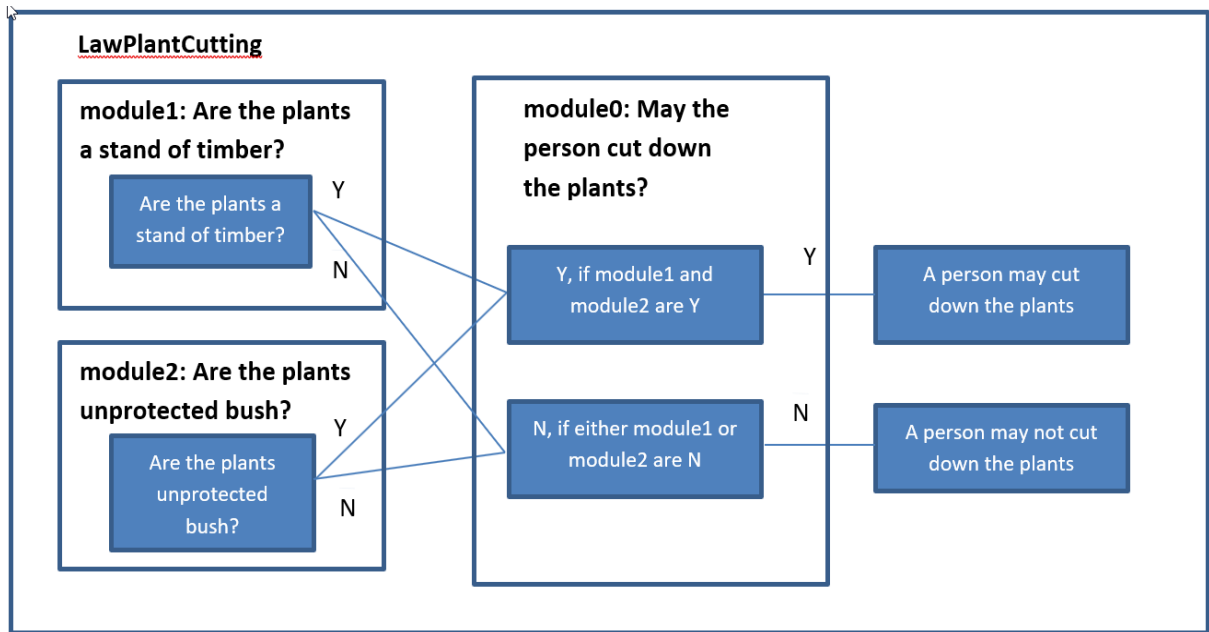


fig 17. Decision tree of fig 15.

At the moment, because of self-imposed limitations of the current implementation, a module's logic blocks cannot use "Laws" or modules of "Laws" from outside of the current "Law".

Operators

Within logic blocks, 3 operators are available. Also, see the section below on quantification logic blocks: basic maths operators are available, and additional syntax for a simple accumulation algorithm is provided for quantification logic block drafting patterns.

OPERATOR	Description	Drafting Example	Discussion
and	If the two values operated on are true, then the resultant value is true. If either of the operands is false, then	<i>This section applies when a person:</i> <i>(1) is a New Zealand resident; and</i> <i>(2) has a fixed establishment in New Zealand; and</i>	All of the numbered paragraphs must be true. One false paragraph means "the section does not apply".

	the result is false	<i>(3) has a centre of vital interests in New Zealand.</i>	
or	If one operand is true the result is true. If both operands are true, the result is true. If both operands are false, the result is false	<i>This section applies when a person has some or all of the following at the end of an income year:</i> <i>(a) trading stock valued under subpart EB:</i> <i>(b) livestock valued under subpart EC:</i> <i>(c) excepted financial arrangements that are revenue account property valued under subpart ED.</i>	In the Drafting Example, the paragraphed colons are “and/or” ... so in terms of the OPERATOR or , the example’s predicate “When does this section apply” has 3 conditions which can be ‘or’ed together; CH 1(1)(a) or (b) or (c) may be true, and any one of them being true results in the predicate being true. If they are all true then the predicate “When this section applies is also true.
xor	The result is true if, and only if one, and only one, of the operands is true	<i>For the purposes of this section, threshold amount is \$416,667 multiplied by the number of months beginning on or after 1 July 2005, if—</i> <i>(i) the person is an Australian resident; or</i> <i>(ii) the person has a fixed establishment in New Zealand and paragraph (i) does not apply.</i>	In the drafting example, only (ii) OR (iii) can be true (or false) at any one time. They are mutually exclusive. So for there to be a threshold amount , one or other of (i) and (ii) must be true, and the other paragraph must be false.

fig 18. Operators.

“IF CONDITION” LOGIC BLOCK DRAFTING PATTERNS

“If condition” logic blocks are the workhorses of the computer language model and are used to represent common drafting patterns. As has been intimated above, the computer language

model, in addition to following Coode's legislative sentence (with the addition of the concept of intermediate predicates), is focused on lists, and "*if condition*" logic blocks are good for lists, as will become apparent below.

In this section, I model in computer language 3 common drafting patterns taken from fig 18. Before using my computer language to model them, discussion of plain English drafting is merited, on the basis that precision in plain English will translate easily into algorithmic law and is good for statutory drafting practice generally.

In my view, modern drafting practice would benefit from more focus on concept relationships as part of the design process. By this I mean very clear visibility on the relationships between inclusions, exclusions, and defined terms, as primary features for determining predicates. Basically, designing layers of (intermediate) predicates and interrelating them.

In terms of lists, placing exclusion lists, inclusion lists, defined terms, and (intermediate) predicates near to the centre of legislative design and drafting practice would be an improvement for statute generally. Clarity around the interrelationship between the concepts embodied in those elements can not help but result in clear English statute.

Following are some thoughts in the legislative design area, other than the self-evident one of "USE COODE'S LEGISLATIVE SENTENCE".

General to specific

Threshold criteria, where the most general and important pre-conditions are put up front in a provision, aid in the easy application of law. So, where some set of general criteria can be discerned, in the sense of fundamental pre-conditions for a law, stating them up front enables a reader to avoid a welter of unnecessary detail in determining their liability at the first instance.

Listing "fundamental" pre-conditions allows shortcuts in decision trees, in the sense that detail can be represented in lower layers, using intermediate predicates, BUT a user may not need to progress down through the layers if the "fundamental" pre-conditions make the detail a non-event for the user up front:

DP 1 Cost of acquiring timber ...

This section applies when a forestry company acquires land with standing timber on it from a seller who is the Crown, the Maori owners, or a holding company of a forestry company. ...

fig 19. Example of threshold criteria.

Complex organization using lists and defined terms:

Lists of pre-conditions for intermediate predicates provide clarity around logical relations. Indeed, using defined terms as vessels for lists, as opportunities to provide lists of pre-conditions, rather than as opportunities to clarify interpretation or (merely) substitute in text, has much to commend it.

Using defined terms as, effectively, headings for lists of the inclusions and exclusions (the pre-conditions) for each component intermediate predicate (being the defined term's existence) requires a high-level legislative design exercise: looking at defined terms less as dictionary entries and more as checklists for the existence of a legal fact (a legal fact being the defined term label).

In terms of design, lists of inclusions and exclusions may or may not be better positioned outside of defined terms, but the principle is the same: clearly marked out relationships between conditions makes a reader's job easier.

Legislative design focused on thoughtful use of lists of pre-conditions, whether in defined terms or not, to represent complexity in English statute translates easily into both a good English reader experience and a good outcome for algorithmic law translations.

So, key intermediate predicates in a law should be identified and made accessible to readers, using a 'simple' clear checklist-type structure. Writing laws using such a design methodology becomes a *transparent* exercise in concept relationship.

Provisos

Coode bemoaned the use of provisos (a practice regrettably still common in some jurisdictions), directing considerable effort towards their removal from drafting practice. His solution ... an exclusion list, conforming to his legislative sentence model.

Sandwich clauses

Sandwich clauses are either provisos in disguise or poorly designed lists ...

Code examples**“AND” pattern**

```

LawSectionXApplies = “Section X applies”;
LawSectionXApplies.module0 = “Does section X apply?”;
LawSectionXApplies.module0.logicblock0 = if (rule1 == true and rule2 == true and
rule3 == true) then return true, else return false;
LawSectionXApplies.module0.rule1 = " Are you a New Zealand resident?"";
LawSectionXApplies.module0.rule2 = "Do you have a fixed establishment in New
Zealand?";
LawSectionXApplies.module0.rule3 = "Do you have a centre of vital interests in New
Zealand?";

```

“OR” pattern

```

LawSectionYApplies = “Section Y applies”;
LawSectionYApplies.module0 = “Does section Y apply?”;
LawSectionYApplies.module0.logicblock0 = if (rule1 == true or rule2 == true or rule3
== true) then return true, else return false;
LawSectionYApplies.module0.rule1 = "Do you have trading stock valued under subpart
EB at the end of the income year?";
LawSectionYApplies.module0.rule2 = "Do you have livestock valued under subpart EC
at the end of the income year?";
LawSectionYApplies.module0.rule3 = "Do you have excepted financial arrangements
that are revenue account property valued under subpart ED at the end of the income
year?";

```

“XOR” pattern

```

LawThresholdAmount = “The threshold amount”
LawThresholdAmount.module0 = “What is the threshold amount?”;
LawThresholdAmount.module0.logicblock0 = if (rule1 == true xor rule2 == true) then
return 416667 * rule3, else return 0;
LawThresholdAmount.module0.rule1 = "Are you an Australian?";
LawThresholdAmount.module0.rule2 = "Do you have a fixed establishment in New
Zealand?";
LawThresholdAmount.module0.rule3 = "How many months are there after 1 July
2005?";

```

fig 20. Code examples from fig 18.

Quantification Logic Block Drafting Patterns

As discussed, quantification logic blocks return a NUMBER, either in the form of a ‘hard’ number (e.g. “100”) or a “rule” value that has been set to a NUMBER. Basic numeric operators can be used too: + - * / < > =, incorporating hard numbers and “rule” values.

Also, additional syntax is available for a simple accumulation algorithm is available. So, a set of line items in accounts can be checked against conditions and, if appropriate (i.e. if the conditions are met), added to the value of the module, for return. Here is a flow chart for the framework of the accumulation syntax:

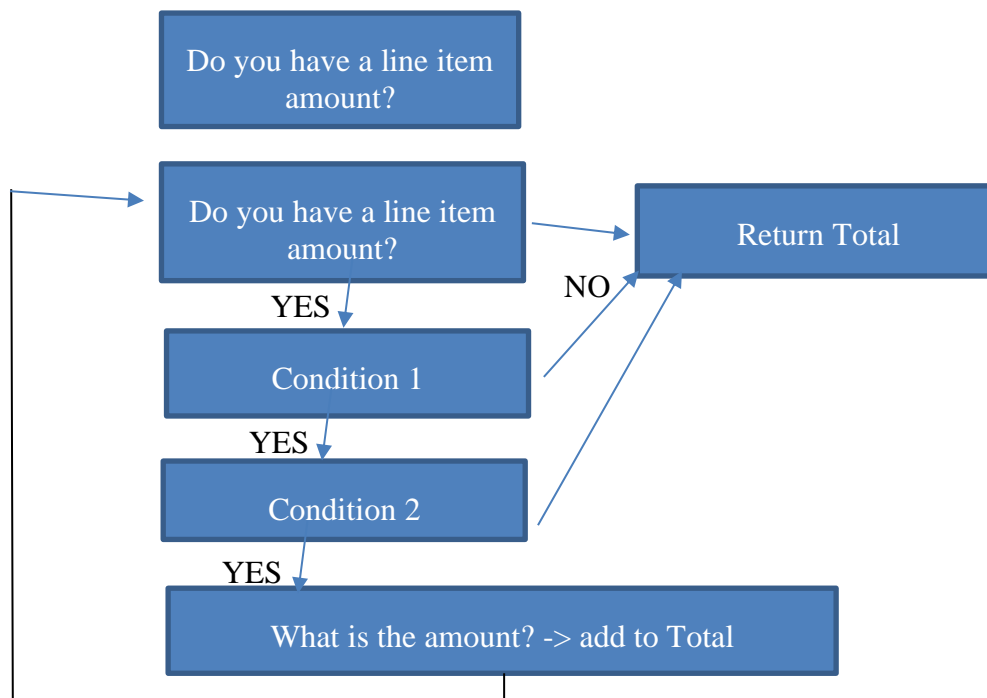


fig 21. Flowchart for accumulation syntax.

```

...moduleX.rule0 = "Have you spent an amount of money?";
...moduleX.logicblock0 = if (rule0==true) then logicblockDep, else return logicblockX;
...moduleX.ruleDep = "Was the amount spent on acquiring depreciable property?";
...moduleX.logicblockDep = if (rule1==true) then logicblockLand, else logicblock0;
...moduleX.ruleLand = "Was the amount spent on land?";
...moduleX.logicblockLand = if (rule2==true) then logicblockX, else logicblock0;
...moduleX.logicblockX = rule3++;
...moduleX.rule3 = "What is the amount?";
  
```

fig 22. 'accumulation syntax'.

Note the accumulation syntax in cyan in fig 22, signaling that the module is for looping as an ‘accumulator’. This allows different amounts (for example line items in accounts) to be looped through and checked against a set of conditions (“rule1” and “rule2”), before returning the total for the module.

The return for logicblock0 contains a logic block. In other words, in logicblock0, there is call to logicblock1, but logicblockX, which contains the main accumulator syntax, is *returned*. This is the only place in the grammar where a logic block is returned.

The logic block that is returned is the one with the accumulation syntax of “++”, linked to the quantification rule (in this case ‘rule3’) for user data.

Also, the logic blocks containing conditions (logicblockDep and logicblockLand) have two calls in them. One to a new rule, or back to the original logicblock0, to start the looping and checking for another line item.

Appendix

The JSON format for submitting data to the computer language model’s “rules”, for a JavaScript implementation of the framework:

```
{“LawX” : {“moduleX” : {“ruleX” : {“data” : X}, “ruleY” : {“data” : Y}}}}
```

The “data”, as represented by **X** and **Y**, can be a string composed of either “true” or “false”, or a number, or a date, in a string, in the format “yyyy-mm-dd”.

The format for submitting data in respect of ‘accumulation syntax’ (discussed under quantification logic block drafting patterns) is still a work in progress, but is, in fact a matter of implementation.

Student Experience of Studying Legislative Drafting Online at Athabasca University

Mohamed Ally, Dale Dewhurst, Godson Gatsha, and Archie Zariski¹



Abstract

This article looks at the challenges faced by legislative counsel (or prospective drafters) in undertaking professional development since the 1970s (including research into training legislative counsel done on behalf of the Commonwealth Secretariat) and uncovers some new challenges and opportunities. To gather these insights, the authors administered an online survey to all current students and graduates of Athabasca University's (AU) Post Baccalaureate Diploma in Legislative Drafting. Students were also offered an opportunity to participate in a follow-up telephone interview. These research instruments focused on a series of questions relating to legislative drafting training. The resulting findings are directly applicable to several

¹ Dale Dewhurst, Associate Professor and Archie Zariski, Professor, Legal Studies and Co-directors of the Graduate Diploma Program in Legislative Drafting at Athabasca University, Canada. Mohamed Ally, Professor, Distance Education at Athabasca University, Canada. Godson Gatsha, Online and Distance Learning Technical Adviser at the Malawi College of Distance Education. This article was the basis for a presentation delivered by Dale Dewhurst and Godson Gatsha at the 2019 CALC Conference (April 1-3) entitled "Continuity and Change in the Training of Legislative Counsel: From Onsite to Online".

of the CALC Conference themes, including the impact of new technologies on legislative counsel, how to employ technologies and design pedagogies that will allow legislative counsel to keep up to date and, most centrally, how to design and develop legislative drafting training materials that meet the specific needs of legislative counsel.

Table of Contents

Introduction	27
Program Description	28
Research Goals and Questions	29
Research Design	30
Online questionnaire	31
Interviews.....	31
Results.....	32
Discussion.....	45
Conclusion.....	52
Appendix: Survey Instrument Questions	53

Introduction

Training legislative counsel to produce high quality effective legislation is a perennial problem for many Commonwealth countries. Larger developed jurisdictions such as Australia, Canada, and the United Kingdom have sufficient staff and resources to provide some in-house training and mentoring. However, smaller less-developed countries struggle with small staff complements and limited time and resources to devote to professional development of their drafters.

The Commonwealth Secretariat recognized the problem in the 1970s and has tried to ameliorate it through promoting and supporting a variety of training programs and technical assistance. The original training offered was residential, which entailed its own problems of travel, time and expense. Some such programs continue today, but they have been supplemented by distance education initiatives spearheaded by the Commonwealth of Learning. This article presents the results of the most recent research project into the experiences of students studying legislative drafting through Athabasca University's distance education program. Two of the researchers, Dewhurst and Zariski also previously participated in an examination of the history of Commonwealth training of legislative counsel and the issues raised by the various modes employed.²

² See Dale Dewhurst, Lionel Levert and Archie Zariski, "[Producing Legislative Counsel: Ways and Means](#)", (2012), 33 *Statute Law Review* 339.

The latest distance education offering of training for legislative counsel is an online diploma program provided by Athabasca University (AU) in collaboration with the Commonwealth of Learning (COL). Study materials developed for COL were arranged and adapted to form four AU courses at the graduate level and supplemented by a fifth “capstone” course designed to demonstrate students’ overall mastery of drafting knowledge and skills. The diploma program launched in 2008 and in 2013-14 the student learning materials were revised and made available free of charge to the public through an open access portal at AU.³

The Post-Baccalaureate Diploma in Legislative Drafting (PBDLD) program at AU has been in operation for a decade and the time was ripe to examine its impact and usefulness in addressing the continuing problem of producing competent legislative counsel. This research was undertaken with that question in mind with the goal of obtaining insight from students in the program.

Program Description

The PBDLD is intended to provide a sound foundation of knowledge, skills, and values for novice or aspiring legislative counsel in Commonwealth jurisdictions or for lawyers who wish to offer legislative drafting services to their clients or employers. Athabasca University offers the program online in a delivery mode that it calls “individualized study” in which each student studies on their own under the guidance of an Instructor who provides mentoring, marking, and feedback. Instructors are very experienced legislative counsel (active or retired) from a wide range of Commonwealth countries.⁴

The advantages for students of the individualized study mode include:

- enrolment and commencement of study at any time without the limits of traditional semesters;
- ability to study online at any time or place;
- ability to study at their own pace.

Some areas for additional focus to derive the most benefit from individualized distance education are:

- learners need to self-regulate their study to complete courses in a timely manner;
- learners must develop alternative opportunities for the interaction and support provided by in person grouped study peers.

³ For a description of this initiative see Dale Dewhurst, John Mark Keyes and Archie Zariski, "[Open Educational Resources for Professionals: A New Era in the Training and Development of Legislative Counsel](#)", (2013), 27 *Journal of Distance Education*, Vol 271. The open access student learning materials may be accessed at: <http://pbdld.athabascau.ca/openaccess/index.php> .

⁴ For a list of current PBDLD Faculty Members see: <http://pbdld.athabascau.ca/faculty/index.php> .

AU expects students enrolled in the individualized study mode to complete a course within six months, although they may finish earlier if they have the time to spend on their studies. The University also offers three two-month extensions of the course length for a fee. If students in the PBDLD progress through the five courses of the program according to these expectations, they should complete the diploma in two and a half years. It has been observed, however, that relatively few PBDLD students meet these expectations and that requests for extensions are common. Further, some students take time away from their studies between courses. In the result, at the time of this research 99 students had been admitted to the program since 2008, but only 19 had graduated.

Research Goals and Questions

The general objectives of this research project were to:

- better understand the challenges students face in studying legislative drafting online;
- identify the factors that contribute towards success in completing the legislative drafting program;
- identify elements of the program which contribute to, or detract from, student success;
- inform the legislative drafting community of these findings in order that future students may achieve greater success.

The research questions generated in relation to these objectives were:

- Q1 - Are there professional and personal factors associated with students that are correlated, some negatively and some positively, with their success in the legislative drafting program?
- Q2 - Is the extent to which students use advanced information and communications technology in their workplace or professional practice positively correlated with their degree of familiarity and satisfaction with the online mode of delivery?
- Q3 - Are students' initial expectations of what would be required of them in studying the program correlated with their degree of satisfaction with the legislative drafting program design (readings, exercises, assessed projects)?
- Q4 - Are students with no employment experience as legislative counsel less successful in the program?
- Q5 - Are students who have a law degree more successful in the program than those who do not have this degree?
- Q6 - Is advance preparation, and program information obtained by students prior to enrolling, positively correlated with their satisfaction and success in the program?

- Q7 - Do students find that the knowledge they gained in the program is of direct practical application and value in their workplace or professional practice?
- Q8 - Is the time available to students to complete the courses positively correlated with success in the program?
- Q9 - Is support from students' employers positively correlated with success in the program?
- Q10 - Is the extent of student interaction with Instructors positively correlated with success in the program?"
- (Note: "Success" to be measured by program completion rates, and survey questions regarding students' time to complete and achievement of goals.)

Research Design

This research was designed to capture "snapshots" of students' experiences in the diploma program at several stages of their studies: pre-admission; in progress; and after graduation. For privacy reasons due to the relatively small number of students involved it was decided not to track individual student's progress and outcomes over an extended time period. While additional interesting data may have been gathered, it would have increased the chances of identifying specific individuals when discussing those data. In turn, a loss of anonymity may also have had a negative impact on the candor of the student's responses.

Admission applications

Students applying for admission to the diploma program are required to submit an "Intellectual Biography" as part of their application. Prospective students respond to three questions of interest to this research:

- What are your primary reasons for applying to this type of integrated program of study?
- What do you want to achieve through the program?
- What particular skills, resources, and experience do you have that will facilitate your completion of this degree?

Anonymized extracts from the intellectual biographies of all program applicants were sorted and compiled according to the responses to these three questions. Three of the researchers each analyzed one of these compilations to draw out common themes across all applicants. These analyses were then exchanged amongst the three researchers to reach a consensus of analysis and description.

Course evaluations

Students in the diploma program are asked to complete an online course evaluation after finishing each course. The following questions of interest to this research are included in the survey:

- Were the course materials relevant and appropriate to your needs? Please comment.
- What were your objectives and expectations when registering in the Legislative Drafting Program?
- How were your expectations fulfilled (partly? fully?).
- What learning outcomes do you consider most relevant or valuable?
- How do you intend to use the competencies acquired, how would these apply to your work life?
- How has or will the Legislative Drafting Program affect your career path and progression?
- What components of the Legislative Drafting Program do you consider most valuable and why?
- What components of the Legislative Drafting Program do you consider least valuable and why?
- Do you have any additional or general feedback on the Legislative Drafting Program structure, content, pedagogy, or delivery?

One of the researchers (Zariski) analyzed the responses to these questions to draw out common themes.

Online questionnaire

A questionnaire was prepared for online completion.⁵ Invitations to participate in this research through completing the questionnaire were sent by the program administration office to 99 current students and graduates of the program and 19 valid responses were received. Responses were anonymous and the results were compiled and analyzed. The questionnaire included inquiries regarding the student's learning experiences, study materials, learning objectives and other related matters. The areas of inquiry are summarized in the Appendix.

Interviews

Respondents to the online questionnaire were asked if they would be willing to participate in a follow up interview by telephone or Skype. Eleven respondents answered "yes" but only four provided contact details, and of those four only three participated in an interview.

Interview questions focused on four principal areas:

- expectations regarding course and program content;
- expectations regarding program delivery;
- challenges faced while studying and responses to them;

⁵ A full copy of the questionnaire may be obtained by emailing Dale Dewhurst (daled@athabascau.ca) or Archie Zariski (archiezariski@athabascau.ca).

- goals and objectives for taking the program and whether it assisted in achieving them.

Interview responses were compiled and analyzed by one of the researchers (Zariski). All instruments and procedures were reviewed and approved by AU's Research Ethics Board.

Results

The basic results and analyses are presented below. We have tagged particular participants' statements with asterisk identifiers. This has allowed us to refer back to them when we draw upon particular statements in our Discussion and Conclusion sections.

Admission applications

Extracts from applications were reviewed by the researchers to identify types of statements that were common to multiple applicants. These types were described as categories of response and the results of these analyses are below.

Your primary reasons for applying to this type of integrated program of study

Most reasons for entering the program could be placed in one of three categories, listed in order of declining frequency of mention:

1. Professional development to enhance job performance and career

Typical statements in this category were:

"I feel the need for more advanced training. ... I am also aware that legislative drafting styles are constantly evolving. Accordingly, I feel that it is important for me to keep up to date with these matters so that my drafting is efficient, accurate and relevant."

"I would like to undertake drafting as a career and I've been told that completing the PBDLD is a good way to stand out amongst candidates."

"My intent is to update and improve my knowledge, skills and abilities so that I can be employed as a Legislative Drafter either full-time or on a contractual basis, in Canada or overseas."

2. Flexibility of the delivery method to learn at any time and from anywhere

Typical statements in this category were:

"Athabasca University offers a suitable programme that is available online which allows me to continue to gain practical work experience while learning and developing my skills in legislative drafting."

“The convenience of not having to travel and leave my family behind along with the well-structured program that I am reading about gave me the impetus to apply for this program of study.”

“I am able to do the diploma without leaving my home country and [sic] interrupting my employment. The self-paced component of the course allows me to honour other commitments while pursuing the diploma.”

3. Expertise of the teaching faculty and quality of the program

Typical statements in this category were:

“The teaching faculty appears to consist of experts drawn from across many Commonwealth jurisdictions, which I believe will provide best practices and diverse perspectives.”

“I was excited to learn about the diploma program offered by Athabasca University, which promises a truly comprehensive approach to legislative drafting.”

“I believe that the intellectual framework, the content of the courses, and the skills developed from completing the PBDLP will provide me with tools for my current role in developing additional organizational policies.”

An outline of what you want to achieve through the program

Objectives of students in terms of what they wanted to achieve were found to fall within four categories, listed in order of declining frequency in responses:

1. Enhancement of knowledge, skills, networks for use in related professional fields

Typical statements in this category were:

“My end goal is to become a more effective drafter and hence be able to further my career here in Given the limited size of the public service here, any additional skills will be put to use in furthering the public good.”

“By completing the Post-Baccalaureate Diploma in Legislative Drafting, I am hoping to gain a better understanding of how legislation is drafted, in order to apply this knowledge to my career. I am also interested in learning more about legislative drafting as a possible career path. Indeed, the Government of ... offers many opportunities for lawyers interested in becoming legislative counsel, and completing the program may open my eyes to a track that I had never seriously considered before. Finally, I am also hoping to build long-lasting relationships with legal professionals from around the world to broaden my professional network.”

“As I am a lawyer and a member of the Band I believe it would be beneficial to have one of our very own lawyers drafting legislation for the [First] Nation. I believe the training and education I will receive through the PBDLD program will prepare me to

draft and amend other laws that we are permitted to have under the *Indian Act*, such as a Custom Election Code, Land Code, Animal By-Law, etc. The PBDLD program will also provide me with training and education to assist other First Nations working toward treaty or wishing to draft laws under the *Indian Act*. ”

2. Advanced understanding of legislation and policy principles and procedures for legislative drafting related use

Typical statements in this category were:

“I sometimes work with specialist legislative drafters, but this is not always the case, especially in the ... region, where legislative drafters are in short supply. It means therefore that my professional work already encompasses legislative drafting, drafting entire statutes, and it is imperative, as a responsible law reform professional, to deepen my legislative drafting skills.”

“To become an effective and efficient draftsman is my goal armed with a comprehensive legislative plan. ... I seek the technical skill involved in converting and rewriting recommendations, political directives and necessary amendments from the plain and simple English language into the more complex vehicle required for legislative drafts. Pursuing this degree on line will allow me to incorporate the new skills acquired into my work on a daily basis and thus to become more proficient in the duties I currently perform.”

“Completing this diploma would allow me to build on the knowledge that I have already obtained through my work at ... with respect to the context, constraints, techniques and objectives of legislative drafting. It would help me to provide more relevant advice to the drafting team and to better contribute to the overall quality of legislation...”

3. Qualifications to obtain employment or promotion in legislative drafting related positions

Typical statements in this category were:

“However, my finding is that a different level of technical proficiency is needed [to draft legislation]. I lacked the technical skill and professionalism to respond to this new challenge. Hence, my interest in this course is to attain this reasonable high measure of technical proficiency and realise my career objective; that of being a Parliamentary counsel.”

“I am now applying to become a program student to complete the course requirements for the diploma in order to obtain further training and education credentials in my area of legal practice.”

“Although I am an experienced drafter, there is no formal qualification for government lawyers to evidence their drafting knowledge. I consider that the PBDLD programme

would provide evidence of a comprehensive study of legislative drafting and also there would be objective assessment of my performance as a drafter.”

4. Promotion and support of justice and social reform, at First Nations and national levels

Typical statements in this category were:

“There continues to be a great need for trained legal drafters in the Commonwealth Caribbean. Drafting is not an area that most lawyers pursue and many Attorneys General’s Chambers have gone without any legal drafters in their chambers, effectively crippling the legislative agenda of many of the Commonwealth Caribbean countries. I believe training in this area would provide me with an opportunity to contribute not only to my own country but to the other countries of the region as well.”

“I have become acutely aware of the importance of well drafted legislation, not only in easing its passage through Parliament, but also in enhancing compliance, reducing litigation and in ensuring faithful interpretation by the Courts, all of which facilitates greater commercial and legal certainty. I seek to develop my legislative knowledge further in order to be of greater service to my country, its stability and its good governance.”

“In this program, if accepted, I would like to specialize and focus my skills in legislative drafting.

It is not a skill that I developed in law school; rather, I picked it up in my work as an articling student and associate. In order to provide specialized and effective laws to our clients [First Nations], I hope to learn the art of legislative drafting.”

The particular skills, resources, and experience you have that will facilitate your completion of this degree

The skills, resources and experience which students stated they would bring to their studies were grouped in four categories in order of declining frequency of occurrence:

1. Legislative, statutory interpretation and work-related experience

Typical statements in this category were:

“I have recently been appointed the head of the legislative counsel unit. Over the years I have gained much hands-on experience and have drafted several statutes and many regulations. As a lawyer, I have the skills, resources and experience to be able to self-study, fulfill tasks and see a project from beginning to end.”

“As an English language specialist, I am aware of ... the ongoing challenge of drafting in precise, unambiguous, consistent language that is relevant to the modern reader. I have attended many of the drafting courses that are delivered internally.”

“As an attorney, I have analytical skills developed in the course of my legal practice – analysing and deconstructing legislation, case law, and legal principles – which I believe will greatly assist me in completing the PBDLD program. My level of discipline is evidenced by my having completed independent studies in a number of areas unrelated to my everyday work. Since completing my legal studies, I have actively sought out opportunities for professional development and have attended several legislative drafting workshops.”

2. Organizational skills and online learning

Typical statements in this category were:

“Having been employed by the government of ...for [many] years, many in senior level position[s], I bring my skills of management, discipline, and ability to excel in a highly competitive environment where multitasking skills are essential; as would be required for distance learning. In addition, the legal profession is my second career, having successfully obtained degrees at the undergraduate and graduate levels and also completing a number of post-graduate courses in the field of ...”

“I am ... precise, organized and highly self-motivated. I believe that I would be successful in the program due to my keen interest in the subject matter and its direct application to my role at the Municipality. I am well-suited to the online format of the course offering since I am computer savvy and use such applications as Microsoft Office on a day to day basis.”

“I am detail-oriented and have a strong work ethic, both of which are skills that should ensure the successful completion of this degree.”

3. Writing and research skills (equal number with the following)

Typical statements in this category were:

“Writing has been my constant companion and sanctuary. Whichever form it took, be it fiction or nonfiction, legal pleadings or a simple message expressing my point of view, I have long appreciated the poetry of stringing words together to communicate a thought or emotion.”

“As a law student and now lawyer I have gained extensive experience in research and writing. In law school I researched and wrote numerous papers. As lawyer I have gained experience in researching case law, writing legal memos and drafting pleadings, contracts and Wills [*sic*]. Further, I have worked with others on revising and re-writing sections of our Band Constitution.”

“By understanding the basics of words and grammar, all other learning has fallen into place for me and I have been in a position to communicate to others with ease whether written or verbally.”

4. Access to material and financial resources

Typical statements in this category were:

“I have been employed as Legislative Counsel/Parliamentary Counsel since 2011. I have the support of my superior, the Chief Legislative Counsel.”

“I am very familiar with legal research resources and where to find legal precedents, which I feel will provide me a "leg-up" in terms of familiarity with legislative structure.”

“I have at my disposal all of the material resources I need to complete the program, including access to a computer and a printer, as well as knowledgeable colleagues who will undoubtedly help me in my learning.”

Course evaluations

Review of course evaluations completed by students from 2009 to 2018 revealed the following.

Were the course materials relevant and appropriate to your needs? Please comment.

A large majority of respondents answered “yes”. The following comments were typical of these responses:

“The course materials were relevant and appropriate for use on this course. They were varied and offered information from a wide range of experts in the field of drafting who have both practical and theoretical aspects of drafting.”

“Yes. The material was quite good. I am not a lawyer, but a policy analyst who works with legislation and writes drafting instructions. I found the materials very helpful.” and

“The materials were a good review of topics that I already had knowledge of.”

Some respondents noted deficiencies and provided suggestions. Here are some examples of these comments:

“The course materials should contain more information on the plain language approach to legislative drafting especially as this approach was asked to be used in several assignments.”

“I appreciate that the course is written for an international student body; however, more direct references to Canadian practices would have been helpful.” and

“Yes, but I would have liked to see examples of what good drafting instructions actually look like. Why not give us some good instructions and ask us to draft from those, instead

of always making us first struggle to analyse inadequate drafts and then guess to fill in the blanks.”

Interestingly, a conference attendee made a similar suggestion when two of the researchers presented the research at the 2019 Commonwealth Association of Legislative Counsel Conference. The attendee suggested that a useful addition to the courses might be to provide additional “good” and “bad” examples of instructions along with analyses and commentary of why they are “good” or “bad”.

The few students who had negative views primarily criticized the materials for use of older legislation and examples that are not in keeping with current drafting practices. Here are some samples: “The examples in the materials are becoming archaic. If followed, they would not be considered correct current form in many jurisdictions (for example the use of “shall” as opposed to “must”),” and “Outdated, and ‘international’. More specialized readings and materials to Canada would be appreciated.” In response to these kinds of comments, the course materials were revised in 2014 to bring them up to date, although they continue to be aimed at an international student body rather than just Canadian students.

Please indicate your objectives and expectations when registering in the Legislative Drafting Program.

Most of the respondents stated that they wished to improve their knowledge of the principles of legislative drafting and their skill in producing legislation. Some typical comments were

“Upon registering for the program my expectation was to learn the principles of drafting and to improve and develop my drafting skill.” and

“My objectives were to: (i) improve my writing style and knowledge of grammar and syntax; and (ii) understand legislative drafting principles.”

It was evident that some of the respondents wished to improve their knowledge and ability especially in relation to instructions provided to legislative counsel for drafting legislation. These students commented:

“My objectives in registering for the program were to learn how to get more comprehensive instructions from the various clients for drafting legislation. Also to learn how to draft a legislative scheme and the various components of a Bill.” and

“My objective was to take courses to complement my employment experience in legislative development, and not to earn another credential. My expectation was that I would learn technical aspects of legislative development that I had not picked up as the policy officer providing instructions to legislative drafters.”

How were your expectations fulfilled (partly? fully?).

Most respondents considered their expectations had been fulfilled, with such comments as:

“My expectations were met as I was able to learn the reasoning behind why and how drafting is done, as well as, how to draft legislation in a proper manner.” and

“Yes. I think the program offers a unique study opportunity that is not offered elsewhere.”

Two qualified positive responses were:

“I would say partially. It would have been good to gain some training in the drafting of international treaties as well.” and

“My expectations in relation to how to draft instructions were only partially fulfilled: most departments simply give instructions by way of an already drafted Act.”

It should be noted that the program includes discussion of the analysis of instructions received by legislative counsel followed by the appropriate questions and consultation, but does not consider explicitly the question of drafting of such instructions in the first place.

What learning outcomes do you consider most relevant or valuable?

Some respondents commended all the learning outcomes related to the program with comments such as

“Assignments gave an excellent introduction to the broad spectrum of skill sets needed for a legislative drafter.”

Others focused on specific outcomes:

“The value of thoroughly understanding and analysing your drafting instructions, before undertaking a drafting project.”

Two students mentioned aspects of amending or repealing legislation:

“The clarification of savings and transitional provisions was also very valuable.” and

“I found the guides on drafting regulations, repeals and amendments and transitional provisions most useful.”

How do you intend to use the competencies acquired, how would these apply to your work life?

Most respondents reported that they would be using the competencies they acquired in the program in their daily work drafting legislation. Typical comments were:

“The competencies acquired will be used in my daily work as a draftsman. The course has helped me to recognize what questions to ask when assessing 'instructions' given by way of an already drafted Act.” and

“To improve the quality of legislation which I draft because I am now more detail oriented and my focus has shifted from producing quick legislation to producing quality legislation.”

Two students indicated that they would use their competencies to help them obtain future positions as drafters.

How has or will the Legislative Drafting Program affect your career path or progression?

Almost all respondents reported that their experience in the program would have a positive impact on their careers. Several noted that it had given them more confidence in their abilities and validated that they were qualified to do their daily work with comments such as:

“The program has impacted my career progression positively as my drafting skills have been markedly improved. I feel more confident in drafting and can see the progress that I have made as a result of the course.” and

“Validated that I am qualified to do the work I was already doing.”

Several others reported that they expected the program to contribute to progression in their careers:

“I hope it will improve my professional career in making me more competitive internationally.” and

“The successful completion of this program will put me in a good position for promotion within the Ministry.”

What components of the Legislative Drafting Program do you consider most valuable and why?

Many respondents found all components of the program to be valuable, commenting:

“I think the combination of principles and real-world examples are important.” and

“I found all the drafting components valuable as I learned from the ground up in terms of drafting an entire bill on my own as well as subsidiary legislation.”

Several students highlighted the interaction with their Instructors as most valuable:

“The interaction between the student and the tutor is very critical, because from time to time a student may be unsure of the direction to take, and he or she will get the necessary guidance from the tutor who would be knowledgeable in the area.”

“The technical aspects of the program were excellent. However, I most enjoyed being able to correspond with the instructors to discuss the legislative drafting career path generally.” and

“Given its broad nature, having examples and being able to communicate with the instructors to understand how to apply the lessons is key.”

What components of the Legislative Drafting Program do you consider least valuable and why?

The majority of respondents considered all aspects of the program to be valuable. Those who were critical singled out the unmarked “quizzes” or “practice questions” (exercises) included in the courses and the material concerning instructions given to legislative counsel:

“The component that I found least valuable was the Instruction component of the Instruction and Compliance Course, because we were left to figure out instructions from a Bill or part of a Bill.”

Do you have any additional or general feedback on the Legislative Drafting Program structure, content, pedagogy, or delivery?

Comments concerning the Instructors in the program were the most frequent responses. Two were critical, commenting that there seemed to be a lack of “consistency” between the expectations of different Instructors, and that some Instructors appeared to require their own “personal styles and preferences” to those taught in the program.

The other comments regarding Instructors focused on improving or expanding the contact between student and Instructor:

“Each teacher I’ve had has had a very different impression of the time and amount of communication they should have with the student. As most communication is by email, nuances in expressions can be lost.”

One lengthy comment in this vein is notable and reported below in full:

“I believe that there should be greater interaction between the Course Instructor and student. Understandably, the Legislative Drafting Programme is an individual-based independent study programme, but I believe that there should be classroom type sessions to allow real time discussions of any issues a student may be having in understanding the course work. Such classroom sessions may be conducted once a week, where the Instructor and all the students assigned to him/her meet in an instant messaging forum/virtual classroom setting hosted on Moodle for e.g. using Blackboard Collaborate™. In this virtual classroom setting students will be able to hear the Instructor teach a topic and can submit questions by voice messaging or text messaging in real time. I believe such an approach will be a great addition and improvement to the Legislative Drafting Programme. I would have appreciated such a feature during my studies because it can easily feel isolating in the Programme when there is no real interaction between the other students in the Programme and the Instructor, apart from submission of Projects to the Instructor and receiving feedback after said submission, or if queries were raised beforehand on exercises found in the Study Guide. Further, this

would enable better understanding of topics which may not be understood from merely reading the Study Guide and attempting the exercises. I believe it is easy to fall behind in the Programme in the absence of real time interaction with the Instructors. This addition would be significantly beneficial to students in the Programme.”

Online questionnaire

There were 19 valid responses to 99 invitations to complete the questionnaire mailed to current and former students in the program, for a response rate of just under 20%. Following are some highlights.

The majority of respondents (58%) were from Canada (the program has had no students from the United States) and the second largest group (37%) were from the Caribbean, Central or South America. Graduates of the program accounted for 42% with the remainder at various stages of completion. A large majority (68%) of respondents were employed in government offices when they commenced their studies. These employees were primarily engaged in general legal duties (32%), legislative drafting (32%), or other government duties (26%). A majority (58%) of respondents had previous experience with distance education or training before entering the AU program.

A slight majority of respondents required formal extension of time (beyond six months) to complete a course for a variety of reasons. However, when asked whether they required “extra time” to complete courses 63% of respondents answered “no”.

A large majority of respondents indicated they would like to pursue further education or training in legislative drafting, with the most popular choice being a Master’s degree. Forty two percent of respondents received no support from an employer or other source in pursuing the program and of those who did the most common form of support was financial. A slight majority of those completing the questionnaire reported that their studies had no significant impact on their career or professional progress. This could be explained in part by the fact that less than half of the respondents had completed the program and received their diploma at the time the survey was administered.

Most respondents reported that they had learned “quite a bit” or “a lot” in relation to all the stated learning outcomes of the program, and that all the outcomes were useful in their work to the extent of “quite a bit” or “a lot”. The largest majorities (over 89%) emphasized the outcome “competence in preparing definitions and interpretation provisions” in relation to both those aspects. The smallest numbers of respondents answering “quite a bit” or “a lot” endorsed the outcome “ability to explain the purpose of legislative plan and competence in preparing such a plan” in relation to their learning and relevance to their work. Smaller numbers of positive responses were also recorded for the outcome “competence to prepare independently a complete piece of legislation suitable for enactment” but this may be explained by the fact that a substantial number of respondents had not yet taken the final

course in the program (LGST 559) in which this outcome is expected to be realized. A large majority (84%) of respondents considered instructor discussion or feedback to be quite a bit, or lots of help, in relation to their learning, and this element of the program was valued highest in comparison to the study materials and online exercises.

Most respondents (89%) used computers a lot in their work and most (84%) reported having no technical difficulties in studying the program.

Correlations in the responses were analyzed using statistical software. Some results of interest are:

- 7 out of 8 graduate respondents reported the program had an impact on their career; of those who were still in progress in their studies only 2 reported such impact;
- Majorities of graduates reported as follows: no course extension required (5/8); no suspension of studies (8/8); no extra study time needed (5/8); studied at home or both home and office (7/8); organized their study (6/8); received no outside support (5/8); had a law degree or post-graduate credential in law (8/8); were not government drafters when study commenced (5/8); and had some experience with distance education (6/8);
- A majority of respondents with a prior legal qualification reported that they didn't need an extension to complete a course (9/16) or extra time to complete a course (12/16);
- Of those who reported receiving some outside support for their studies a majority (7/11) indicated they needed an extension to complete a course, but this proportion was reversed in a later question when a majority of those respondents (7/11) reported they needed no extra time to complete courses;
- A majority of respondents who were legislative drafters when starting their studies reported requiring a course extension (5/6) and the number was evenly divided between those who needed extra time for their studies and those who did not;
- Respondents who reported studying mostly at home formed a majority of those who did not require course extensions (7/9) or extra time to complete courses (7/12);
- A majority of those respondents who had some previous experience with distance education or training required an extension of time for a course (7/11) and needed extra time to complete courses (6/11).

Interviews

Three respondents were interviewed by telephone by Zariski who took notes that were later transcribed and reviewed. Two of the interviewees were current students in the program and the other had graduated.

Expectations regarding course and program content

All three indicated the content of the courses was pretty well what they expected, although one anticipated more details of jurisdictional idiosyncrasies. One would have liked to see more coverage of policy development and another of incorporation by reference and sub delegation of legislative power. One suggested including examples of good and bad drafting with critical analysis and comparisons between jurisdictions.

Expectations regarding program delivery

One interviewee who had taken other online courses found the online learning platform used in the program to be easy to learn and use. The two others were not as comfortable and both recommended facilitating more engagement and communication between students, Instructors and the administration. Two respondents commented on the advantage of flexibility and control over their own study schedules. Two also considered easy access to Instructors to be an advantage.

One student found online study to be a lonely pursuit especially as they considered themselves an “extravert”. This interviewee recommended synchronous communication channels amongst students and between students and Instructors.

Another interviewee commented on the problem of procrastination and the need to obtain paid extensions of their course contract period. This student wondered whether courses should be lengthened to one year, and whether automated prompts or reminders to complete assignments could be sent to students.

Challenges faced while studying and responses to them

Two respondents mentioned the pressure of their professional workload as a challenge to studying. One of these also mentioned family responsibilities and added that, although nominally given time at work to spend on studying in practice, no such time was available. This student recommended that AU use these research results to encourage employers to recognize the value of the program as continuing professional development and possibly fund students to take it. The student wondered whether this might alter their attitude towards allowing time to study.

One respondent who had not studied online before found that using the online learning platform and communication channels within it was a challenge that delayed completion of courses. This student recommended more flexibility in communication methods.

One student suggested that a residential component to the program might respond to some of the challenges students face.

Goals and objectives for taking the program and whether it assisted in achieving them

All three interviewees were relatively new to drafting legislation and therefore were looking for more knowledge and skills in this area. They also achieved these goals at least partially, although one didn't appreciate the solitary nature of studying online.

Two respondents suggested that AU could do more to reach out to students and make it easier for them to contact AU staff such as student advisors or the Program Directors. One of these added that AU could provide more tips, hints and strategies for success ("mindset advice") to students as well as assist them in persuading employers to provide time for study and financial support.

One interviewee recommended that the program be expanded to include a Master's degree, or that it be articulated with such a degree at another institution.

These respondents made some additional recommendations: enable more connections between students, Instructors and alumni and sharing of personal and professional information; setting up a "buddy system" for students or small student groups for motivation and support; provide more "live" interaction such as webinars and possibly some residential study.

Discussion

Due to the nature of the research questions, and the limited data set, we have not attempted to establish firm conclusions. Also, due to the anonymity of most of the survey instruments, it was not possible to connect individual survey results with individual class evaluations to gain a more detailed picture of what particular individuals believe. However, we have been able to determine several interesting trends, derive questions for future research, confirm various strengths of the program, and identify ways that the program may be further strengthened.

Q1 – Student Professional and Personal Factors

When we considered our first research question (Q1) – whether there are student professional and personal factors correlated, some negatively and some positively, with student success – we were able to determine that this did appear to be the case. As we discuss in more detail below, some of the more significant factors appear to be:

- the availability study time at work;
- the challenge of juggling work-life balance at home;
- personal study styles (introverted versus extroverted); and
- familiarity with distance education and individual study settings.

As we discuss in more detail below, there were also a number of parallels between these personal and professional factors and our third research question (Q3) – whether students' initial expectations of what would be required of them in studying the program are

correlated with their satisfaction. Some students' responses indicate a direct awareness of the diversity and ongoing evolution of common law drafting styles. As a result, they anticipated diversity in the materials and differences in Instructor approaches to feedback on the marked drafting projects. This seems to have enabled them to take any such differences in stride and see them as learning opportunities. In a similar vein, those who took a broader vision, with a view to pursuing employment in Canada or overseas, also appeared anticipate more diversity and derived more satisfaction from the course.

One area of response in Q1 that appeared to shape student success and satisfaction related to the students' personal living situations. When we examined the data regarding students' views of their work-life balance, juggling work-life demands appeared to be an important obstacle to success and satisfaction. As we discussed above, seven of nine students who studied primarily at home indicated that they did not require a course extension; whereas, five of six of the respondents who were working in a drafting office when they began their studies required an extension.

Also, related to work-life balance, were the personal living situations of those who wanted to pursue advanced learning but were unable relocate to do so. Those who gave a higher priority to be able to study at a distance (to continue to gain practical work experience while studying, not have to leave their family behind, not have to leave their home country) were not expecting or looking for the same level of personal interactions. As such, the reduced number of such interactions did not negatively impact their success in the course. Similar views were expressed by those who considered themselves more self-motivated or experienced in modes of self-study. Contrasted with these views and expectations were those who would have preferred some residential component in the program; or the inclusion of more regular university-initiated contacts.

One element where reactions were mixed was in the students' opportunities to connect with their Instructors and benefit from those interactions. This will be discussed again in connection with Q10, but what is most pertinent for Q1 is the recognition that some students' personal study styles were more extroverted by nature. That is, they value learning environments that provide enhanced interaction with their Instructors and fellow students – when it is absent, or reduced, it negatively impacted upon their success or satisfaction with the program. One solution presented in the comments we analyzed suggested the inclusion of more interaction via online communication platforms. This could address feelings of isolation but may require a move from an individual study basis⁶ to a group study format⁷ so that participants could discuss materials they were all working on at the same time.

Also, those individuals who were motivated by goals of enhancing their technical skills and proficiencies appeared to appreciate the detailed materials and the ability to connect with

⁶ Where students progress on their own courses at their own pace.

⁷ Where students are studying the same materials on the same timetable.

experts from around the world: they less frequently indicated concerns about the absence of traditional in class interactions.

As a result of these comments and observations, it is reasonable to conclude that Q1 was supported (that there are student professional and personal factors correlated, some negatively and some positively, with student success). However, further refinements in the survey methods would be required to tease out the extent, and the exact nature, of these differences. Based upon the evidence we were able to gather it appears that the following factors were positively correlated with student success and satisfaction:

- expectations about the more independent and self-motivated nature of distance education;
- living and work situations that did not allow for extensive educational travel or relocation;
- more diverse student learning goals; and
- the students' expectations that they would be studying more diverse and or technical materials.

Those factors that appeared to be more negatively correlated with student success and satisfaction were:

- an extroverted or group learning style or preference;
- the desire for more personal interactions; and
- learning goals focused on developing skills for a particular or local drafting style.

Q2 -- Information and communications technology

When we turn to research question two (Q2) – whether the extent to which advanced information and communications technology is used in their workplace or professional practice is positively correlated with students' familiarity and satisfaction – the results of our inquiry support a positive response to this research question. Those familiar with multitasking in a computerized workplace indicated more satisfaction with the program; as did those who were familiar with the program's online learning platform. Those with less familiarity with the learning platform were less comfortable and recommended more engagement with others (faculty, administration, peers) to help overcome these concerns. While the data set was small, it appears to support the intuitive result that those who are familiar with computer learning technologies are more successful when using it; those with less computer literacy are less successful.

Q3 – Student Program Expectations and Satisfaction

Research question three (Q3) – whether students' initial expectations of what would be required of them in studying the program are correlated with their degree of satisfaction –

was discussed briefly in connection with Q1 above. Some students' initial expectations for the program were that they would

- have the opportunity to study broader and more comprehensive materials; and
- be able to study and build relationships with expert Instructors from across the Commonwealth.

One comment indicated a desire to study even more on various jurisdictional idiosyncracies they may encounter. As a counterpoint to these views, other students suggested improvements to the materials to include more emphasis on plain language drafting and other approaches more commonly used in Canada. Two critical responses focused on the students' desire for more consistency of approach across the Instructors. Any alterations in program design in these areas would have to be carefully balanced as any advantages that may be gained in consistency may be offset by losses in the diverse expertise and global perspectives of the instructors.

As we touched on above, the most divergence between initial expectations and actual experience in the program related to students who were less familiar with individual studies and distance learning environments. This is an important aspect to attend to when developing information on program websites and in introductory materials.

Q4 – Employment Experience & Q5 – Law Degrees

When examining Q4 – whether students with no employment experience as legislative counsel are not as successful in the program – and Q5 – whether students who have a law degree are more successful in the program – we were not able to discern distinct trends that would fully support either research question. This may be due to the entrance requirement of either a law degree or else another related degree and a minimum of three years' experience working in a drafting related work. As a result, the students without law degrees still had varying levels of experience in areas related to drafting or areas involving legal interpretation, implementation or enforcement. As for those with a law degree, some of the recent law graduates had little prior experience in drafting work. In our view, this tended to blur the boundaries between the two groups in our study and made it impossible to make any clear distinctions between them on Q4 and Q5. Of course, if we were to compare either group to a third group with no law degree and no experience in drafting, we expect the differences would be clear.

For example, one participant indicated that legislative drafters are in short supply in the participant's jurisdiction so the participant's work encompassed legislative drafting and even drafting entire statutes. Contrast this work experience with that of a law graduate who indicated that legislative drafting was not a skill that was taught or developed in law school; any experience this participant had was a result of work completing during the articling year. So, while a law degree does ensure a level of familiarity with the nature of laws and

legal systems, it does not guarantee any level of theoretical or practical expertise in legislative drafting that can often be gained by non-lawyers performing drafting related work.

Q6 – Advance Preparation and Program Information

Q6 is somewhat overlapping of all the previous questions – whether students' advance preparation and program information obtained prior to enrolling in the program is positively correlated with student satisfaction and success in the program. As above, higher levels of satisfaction and success were derived by students who

- were familiar with the nature and requirements of distance education,
- wanted to study broader jurisdictionally based materials, and
- had experience working in drafting related areas.

In short, participants who had matching expectations of what the program included believed that it fulfilled those expectations. This does not mean the participants had no suggestions for improvement. Indeed, improvements were suggested in the removal of more archaic language from the materials, inclusion of more plain language materials, and suggestions for community building and networking that may be possible even in the distributed study environment of a distance education program. It is, of course, not surprising that students who expected to receive what the materials offered found their expectations to be met. However, what can be learned from this is that valuable gains in student satisfaction may be possible by providing more detailed initial information on the program's contents and expectations.

Q7 – Practical Application and Value

One research question that seemed to most strongly attract a positive answer from students with or without a law degree was Q7 – whether students found that the knowledge they gained in the program is of direct practical application and value in their workplace or professional practice. This conclusion can be derived from the survey questions that focused on the students' attainment of the course learning objectives. The participants were asked whether they learned little, some, quite a bit, or a lot, related to:

- (1) explaining the nature of legislative drafting in the Commonwealth tradition;
- (2) communication ability and grammatical competence;
- (3) the ability to analyze legislative drafting instructions;
- (4) understanding constitutional, interpretive and other constraints on legislation;
- (5) explaining the purpose and development of legislative plans; and,

(6) the ability to explain the purpose of (and prepare) various types of provisions such as commencement provisions, definitions, interpretation provisions, purpose clauses, delegated powers, and transitional provisions.

In these areas, most often 80-90% of the participants' indicated that they had learned "a lot". In the few areas that were not in the 80-90% range, the percentage of participants who felt they learned "a lot" never dropped below 60%. This speaks highly of the quality of the materials, the instruction, or some combination of the two. In order to determine the source(s) of this satisfaction and success it would be necessary to administer more granularized survey questions.

We did, however, struggle initially with an apparent contradiction between the strong support for Q7 (discussed above) and other responses where over 50% of the participants indicated that the program had no significant impact in advancing their career or professional progress. We believe that what had initially appeared to be an inconsistency may be explained by at least three main factors:

- (1) some students took the program later in their careers or as an affirmation of the skills they possessed in their current position;
- (2) only 8 of the 19 respondents had come from program graduates; and
- (3) those 8 graduates had all graduated recently before completing the survey.

Thus, some students were not looking at the program as a way to advance their careers and others had not yet had sufficient time to determine whether the program would provide this beneficial effect.

Q8 – Time Available & Q9 – Employer Support

Turning to research questions eight (Q8) and nine (Q9), it is useful to consider them together. Q8 considered whether the time available to students to complete the courses positively correlated with success; and Q9 considered whether support from students' employers positively correlated with success in the program. As intuitively anticipated, positive responses to both of these research questions were supported. Of note (as discussed above) were the results that indicated a majority of students studying at home did not require extensions; whereas, a majority of students working as legislative drafters did require extensions. As indicated by one interviewee, "although nominally given time at work to spend on studying in practice no such time was available". It was suggested that perhaps AU could assist students "in persuading employers to provide time for study and financial support" to assist the students complete their studies.

However, some of the data related to Q8 and Q9 were confusing. As discussed above, in response to some of the questions, a slight majority indicated that they did not require any course extensions and that no extra study time was needed. However, in response to other

questions, a slight majority indicated that they did require course extensions. To repeat from above:

“Of those who reported receiving some outside support for their studies a majority (7/11) indicated they needed an extension to complete a course, but this proportion was reversed in a later question when a majority of those respondents (7/11) reported they needed no extra time to complete courses.”

“Respondents who reported studying mostly at home formed a majority of those who did not require course extensions (7/9) or extra time to complete courses (7/12);”

“A majority of those respondents who had some previous experience with distance education or training required an extension of time for a course (7/11) and needed extra time to complete courses (6/11).”

What may be occurring here (and further research would be required to confirm this) is that there may be some equivocation between “needing an extension”, “needing extra time”, and “requiring an extension of time”. It may well be that there were several students who did not formally receive course extensions from Athabasca University, but who would have greatly appreciated having more time from their employers or from their work-life demands to facilitate their studies.

Q10 – Student Interaction with Instructors

Q10 – whether the extent of student interaction with Instructors in the program is positively correlated with success – relates to program approaches being more responsive to student needs. This was affirmed both by positive answers from respondents who had had more direct support from the Instructors and found it to be beneficial; and, from those who felt they had not had as much Instructor contact as they wanted and suggested that more would be beneficial. For example, participants felt that the Instructional experts from across the Commonwealth could provide best practice and diverse perspectives. When the student is unsure of which particular direction to take on an exercise or project, the necessary guidance can be obtained from the Instructors. The ability to correspond with the Instructors to discuss the materials is key. Additionally, the ability to connect with the Instructors to discuss legislative career paths and other general matters was found to be rewarding.

Where a student’s particular experiences interacting with the Instructors was not quite what they had hoped it would be, the students commented on an apparent lack of consistency between Instructors; and that when communication was primarily by email, nuances in the communication could be lost. It was then suggested (as touched on above) that perhaps virtual conferencing, voice messaging, or synchronous messaging or chats, would be beneficial. In short, whether complimenting the program for the extent of the Instructor interactions the participant experienced or when suggesting ways to further expand

Instructor contact, Q10 positing a correlation between student success and Instructor interaction was consistently supported.

Conclusion

What useful conclusions and guidance can be drawn from these data and considerations? Based upon our analyses, we believe there are several points worthy of affirmation and several additional avenues to strengthen the program even further.

First of all, the respondents had numerous positive comments that should not be lost in future program enhancements. Students commented that the knowledge gained in the program has helped their confidence in their professional career. It provided innovative ways to advance several diverse interests and helped to build independence and flexibility in performing drafting tasks. In the words of one respondent, “I thoroughly enjoyed the course but it was the most challenging I have ever taken, and I say this having already earned 5 university [degrees].”

One initial enhancement to consider is that providing some additional information and training on the nature and expectations of distance education pedagogies may allow students to become more fully engaged in the materials sooner. This may have a beneficial impact on both the actual and perceived time demands experienced by the students. We all have some familiarity experiencing an aversion to the upfront learning time required to navigate a new software program. This is often the case even when we know that gaining some level of mastery over the software will be valuable to us in the long-term. Short well-indexed online training segments on the use of the various aspects of the online learning platforms may be helpful. These may combined with the addition of quick access guides to allow the students to more easily navigate the online learning platforms until they develop familiarity with what the platforms have to offer. They may allow students to select topics where they have less familiarity and simply dive into them without having the added pressure of learning the technology at the same time they are trying to complete for-credit course work.

As discussed above, it was no surprise that students were more successful in the program when their expectations matched what the program offered. The opportunity for improvement here could be two-fold. First, in the online training segments (or in other formats), the content of the training could contain or explain:

- further information in advance on what the program contains;
- the pedagogical philosophy behind the program’s design;
- information on the breadth and focus of the course materials; and
- why we believe exposure to a broad range of international experts is better preparation for meeting the demands of diverse drafting clients than trying to ensure consistency and conformity across all of the program’s instructors.

Another enhancement may come from providing students with some additional up-front information on successful study habits, study time expectations in the program, and time management suggestions. While nothing can create time for students that does not exist for them, realistic initial expectations of the program's time requirements may help with better student planning. For example, some students find that setting aside fixed and sacrosanct study time each week is helpful. Also, where actual time away from work is not available (or where it is promised but not practically possible), up front understandings of the required time demands may promote better decisions of *when* the students should start a course to best fit with work demands.

Like the up-front information on platforms, pedagogies and time demands, information on how to assess personal study habits (more introverted or more extroverted) may assist students in tempering their expectations when considering whether and when to take the program. Also, so the valuable suggestions are not lost, it will be worthwhile to consider whether additional synchronous interactions can be built into the program while still retaining the individualized study mode that allows the required study flexibility for the students. For example, enhanced emphasis on the use of Skype (or similar audio-video communication platforms) for communications with the instructors may be preferable over primary emphasis on written communication. As a second example, periodic inclusion of program-sponsored webinars on particular topics may help the students build community while also obtaining advanced information on particular topics.

While the program materials were found to very valuable, as with all programs there is always room for improvement. For example, continuing to include more plain language content and providing additional examples from multiple international jurisdictions could further enhance the quality of the materials as both study and resource materials.

Finally, retaining and enhancing mechanisms for continued feedback on all aspects of the program will support our ongoing efforts to make a strong program ever stronger.

Appendix: Survey Instrument Questions

- What was the last course you completed in the Post-Baccalaureate Diploma in Legislative Drafting (PBDLD)?
- Did you require an extension of time to complete any of the courses in the PBDLD?
- Did you suspend your studies in the PBDLD program at any time?
- Did you withdraw from your studies in the PBDLD program?
- Did you require extra time to complete the courses in the PBDLD? If “Yes”, select the reason(s) why you needed extra time.
- The PBDLD has several learning outcomes. Please evaluate how much you have learned in relation to them as a result of your studies in the program.

- Ability to explain the nature of legislative drafting in the Commonwealth tradition, the duties and responsibilities of legislative drafters, and the process of preparation of legislation.
 - Communication ability, and competence to write grammatically clear English for legislative purposes.
 - Capacity to analyze legislative instructions, seek clarification if necessary, and convert them into legislative sentences.
 - Ability to explain constitutional, interpretive, and other constraints on legislation, and to work within them when drafting.
 - Ability to explain the purpose of a legislative plan and competence in preparing such a plan.
 - Ability to explain the common structure of legislation, and the purpose of each element.
 - Competence in preparing commencement provisions.
 - Competence in preparing definitions and interpretation provisions.
 - Competence in preparing purpose clauses and application provisions.
 - Competence in preparing delegated powers.
 - Competence in preparing transitional provisions and schedules.
 - Capacity to evaluate existing legislation, and prepare amendments to change or improve it.
 - Competence to prepare independently a complete piece of legislation suitable for enactment.
- Please evaluate the contribution of these elements of the PBDLD program to your learning.
 - Online study.
 - Online exercises.
 - Drafting project assignments.
 - Instructor discussion or feedback.
 - Did you experience any technical difficulties (eg. computer, Internet) in studying the PBDLD?
 - Where did you study and work on the PBDLD program?
 - Did you study the PBDLD in an organized way?
 - Did you receive support from an employer or other source in pursuing the PBDLD program?
 - Do you have any suggestions or recommendations for improving the PBDLD program?
 - Have your studies in the PBDLD helped to advance your career or professional progress?
 - Please evaluate the relevance and usefulness in your work of the following skills taught in the PBDLD.

- Competence to prepare independently a complete piece of legislation suitable for enactment
 - Since starting to study the PBDLD have your primary work responsibilities changed?
 - Have you received any other formal education or training in legislative drafting?
 - If you have received other formal education or training in legislative drafting, how valuable was it to you in comparison to the PBDLD?
 - Would you like to pursue further education or training in legislative drafting?
 - Your Background
 - When you started studying the PBDLD where were you?
 - When you started studying the PBDLD what was your highest educational attainment?
 - When you started studying the PBDLD what was your situation?
 - When you started studying the PBDLD what was your primary work?
 - When you started studying the PBDLD did you have any previous experience with distance education or training?
 - To what extent do you use computers in your everyday work?
-

Translating Policy into Law: A Case Study of Ghana's Social Protection Legislation

Estelle Matilda Appiah¹



Abstract

The Sustainable Development Goals of the United Nations, other international commitments by the Government of Ghana and the Fourth Republican Constitution of the Republic of Ghana provide the framework for the Ghana National Social Protection Policy of December 2015. The Social Protection Policy seeks to achieve a well co-ordinated, cross-sectoral social protection system that enables people to live in dignity through income and livelihood support, empowerment and improved systems for the delivery of basic services. Its aim is to progressively realise social protection as an economic right. The policy also recommends the enactment of a dedicated social protection law.

Legislative counsel have a critical role to play in the transformation of policy into law and to clarify policy objectives. This article charts the course taken to secure social protection by law to ensure that a modern system of social protection has a significant impact on incomes, equitable development and increased access to social services for the extreme poor and vulnerable in Ghana. It also takes into account the qualities required for a good draft law.

¹Legislative Drafting Consultant, formerly the Director of Legislative Drafting, Attorney-General's Department, Ministry of Justice, Accra, Ghana. This article is based on a presentation at the Fifth International Conference on Legislation and Law Reform in Washington DC, 12-13 April 2018.

Table of Contents

Introduction	57
Constitutional Considerations.....	57
Rule of Law Considerations.....	59
International Law Considerations.....	60
Ghanaian Laws	61
Social Protection Policy.....	61
Drafting Process and Role of Legislative Counsel.....	62
Draft Legislation to Implement the Policy	64
The way forward.....	66

Introduction

Social protection is defined as a range of actions carried out by the state and other parties in response to vulnerability and poverty, which seek to guarantee relief for those sections of the population who for any reason are not able to provide for themselves.²

This article outlines social protection policy in Ghana and provides details about social protection programmes introduced by the government to alleviate poverty levels amongst the vulnerable. The policy-making process is examined to outline the elements to take into consideration when translating policy into legal provisions that are enforceable under the principle of participatory democracy and governance.

It also details the qualities required for a good draft law that legislative counsel should fully consider in order to produce a legal framework for the preparation of legislation in accordance with the rule of law in a globalised setting. The stages in the legislative process will be examined from the perspective of legislative counsel tasked to translate social policy into law and the challenges faced in this regard. It is the responsibility of legislative counsel to advise on what should be included and excluded in a law, taking into consideration the importance of transparency and accountability, to ensure that those for whom the strategies are formulated benefit from them.

Constitutional Considerations

The premier consideration for the preparation of any policy that will ultimately be translated into legislation is the supreme law, the Constitution. The Constitution of the Republic of

² Ghana National Social Protection Policy, Launched June 2016, Ministry of Gender, Children and Social Protection, Ghana.

Ghana,³ which came into force on the 7th January 1993, has articles that support social protection

Chapter 5 of the Constitution provides the fundamental human rights basis for social protection. Article 17 on equality and freedom from discrimination seeks to redress imbalances as regards gender, place of origin and occupation, amongst others.⁴ Article 24, sets the framework for economic rights, decent work, social insurance, health and safety and welfare in employment. It also provides for the development of creative potential and contributory schemes for economic security.⁵ Article 25 provides for educational rights.⁶ Article 27 provides for women's rights related to maternity benefits.⁷ Under article 28 on children's rights, Parliament is required to enact laws that are necessary to ensure that every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except when the parents have surrendered their rights and responsibilities in accordance with law.⁸

The aspirations in the Directive Principles of State Policy in chapter 6 of the Constitution include the provisions for a just society and reasonable access to public facilities and services for each citizen (article 35 (3)).⁹ The State is also to cultivate respect for fundamental human rights and freedoms and the dignity of the human person (article 35 (4)).¹⁰ Furthermore, it is incumbent on the State to prohibit discrimination and prejudice on grounds of place of origin, circumstances of birth, ethnic origin, gender, religion, creed and other beliefs (article 35 (5)).¹¹ Article 36 on economic objectives provides that the State shall take the necessary action to ensure the right of persons to adequate means of livelihood, suitable employment, public assistance and maximum welfare.¹² Article 37 on

³ The Fourth Republican Constitution (1992).

⁴ Article 17(1): All persons shall be equal before the law. 17(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

⁵ Article 24 (1) Every person has the right to work under satisfactory, safe and healthy conditions and shall receive equal pay for equal work without distinction of any kind.

⁶ Article 25(1) All persons shall have the right to equal educational opportunities and facilities and with a view to achieving the full realisation of that right....

⁷ Article 27(1) Special care shall be accorded to mothers during the reasonable period before and after child-birth and during those periods, working mothers shall be accorded paid leave.

⁸ Article 28 (1) Parliament shall enact such laws as are necessary to ensure that

(a) every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with law;

⁹ Article 35 (3) The State shall promote just and reasonable access by all citizens to public facilities and services in accordance with law.

¹⁰ Article 35 (4) The State shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person.

¹¹ Article 35 (5) The State shall actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs.

¹² Article 36 (1) The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare,

social objectives, guarantees protection and promotes basic human rights and freedoms that include the rights of the disabled, older persons, children and other vulnerable groups.¹³ These provisions provide the constitutional basis for social protection.

The independent constitutional bodies, the National Development Planning Commission¹⁴ and the Commission on Human Rights and Administrative Justice,¹⁵ are also relevant in the realisation of basic human rights and social policy interventions.

Rule of Law Considerations

The UN Secretary-General has described the rule of law as:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁶

A checklist for the rule of law by Frank Emmert provides the following:

- no government action without legislative basis;
- all government action subject to fundamental rights and freedoms enshrined in the Constitution and the provisions of the legislative basis;
- reasonably clear and fair laws about all important areas of economic and state activity;
- educated and efficient administrations to apply the laws in a fair and consistent manner;
- independent and investigative media to report about government (mis-) conduct;
- educated and courageous citizens and attorneys to demand good governance;
- independent courts to provide checks and balances for the government and to protect the rights of citizens and minorities;

freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy.

¹³Article 27 (1) The State shall endeavour to secure and protect a social order founded on the ideas and principles of freedom, equality, justice, probity and accountability as enshrined in Chapter 5 of this Constitution, and in particular, the State shall direct its policy towards ensuring that every citizen has quality of rights, obligations and opportunities before the law.

¹⁴ Established under Article 86 of the Constitution.

¹⁵ Established under Article 216 of the Constitution.

¹⁶ [Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, August 23, 2004 \(S/2004/616\)](#) at 4.

- genuine enforcement mechanisms to stop government violations of the law and to provide compensation to victims.¹⁷

The rule of law supports transparency and, in accordance with that principle, there should be public hearings and open discussion. The rule of law also promotes fairness in decision-making. This means that every effort should be made to ensure that decisions are to be made by more than one person and decision makers are free from any appearance of bias or conflict of interest. Any legislative gaps should be identified and plugged to ensure that legislative provisions adhere to the principles that underpin the rule of law. In order to have effective checks and balances, there should be adequate reporting arrangements. In addition, human rights norms and standards should apply and the fundamental principle that the law is supreme and no one is above it should be clearly understood by all. Equality before the law should be manifested in law enforcement and there should be rule according to law, rule under law and rule according to higher law.¹⁸

The principles of the rule of law should be observed by legislative counsel as keepers of the statute book. Legislative counsel are in a unique position to apply its tenets.

International Law Considerations

The creation of the League of Nations and then the United Nations after the Second World War established the principle of global interconnection. Transnational connections cut across nation-state boundaries and create a web of people, networks and institutions. This has led to the decline of the nation state and greater emphasis on the globe as a single unit in the context of international standards. State parties have made commitments to common standards. The world has become a global village and no country can cut itself off from the rest of the world.

We are told by C. Thomas that globalisation “... refers broadly to the process whereby power is located in global social formations and expressed through global networks rather than through territorially-based states.”¹⁹

The universal Sustainable Development Goals of the United Nations,²⁰ other international commitments and the Fourth Republican Constitution of the Republic of Ghana provide the framework for the Ghana Social Protection Policy.

The Republic of Ghana has also ratified multilateral international and regional treaties on social policy that require transformation into domestic law. And it has obligations under

¹⁷ Frank Emmert, [“Rule of Law in Central and Eastern Europe”](#) (2008), 32 *Fordham International Law Journal* 551.

¹⁸ *Ibid.*

¹⁹ C. Thomas, “Globalization and the South”, in C. Thomas and P. Wilkin, ed., *Globalization and the South* (Palgrave, Macmillan: London, 1997) 6, as cited in I. Clark, *Globalization and International Relations Theory* (New York: Oxford University Press, 1999) at 10.

²⁰ [United Nations General Assembly](#) Resolution A/RES/70/1 of 25 September 2015.

various national and international instruments that make it imperative that a coherent, integrated social protection framework is developed to ensure consistent delivery of the required interventions. These include commitments to the African Union to pursue comprehensive programmes of social protection outlined in the African Union Social Policy Framework (2003). Others are the Livingstone Declaration (2006), the Ouagadougou Declaration and Plan of Action (2004, 2008) and the African Union Heads of State Common Agenda for Action Post-2015, particularly under Pillar One (Structural Economic Transformation and Inclusive Growth and Pillar Three – People-Centred Development, section 38). The country also has commitments to the Millennium Development Goals that require action on social protection.²¹

There are many policies of the Ministry of Gender, Children and Social Protection that have implications for social protection in Ghana. These policies make provision for critical poverty reduction interventions such as the National Ageing Policy, 2010, the Child and Welfare Policy, 2014 and the National Gender Policy, 2014. They are supported by two secondary policies, namely, the School Feeding Policy, 2015 and the Labour Intensive Public Works Policy, 2015. There is also the National HIV/AIDS and STI Policy, 2013 of the Ghana Aids Commission.

Ghanaian Laws

The Republic of Ghana has ancillary laws concerned with social protection. These recognise rights ranging from the rights of the child to the rights of persons with disability and address human trafficking and protection for the mentally vulnerable. There are also other laws and channels for the delivery of social protection at the sub-national level and within the public administration system. These are the *Local Government Act 1993* (Act 462) and the *National Development Planning (System) Act 1994* (Act 480). Key partner institutions with mandates for social protection related activities are also backed by legislation the National Health Insurance Authority, *National Health Insurance Act, 2012* (Act 852) and the Youth Employment Agency, *Youth Employment Act 2015* (Act 887) among others.

Social Protection Policy

The Social Protection Policy seeks to achieve a well-coordinated, cross-sectoral social protection system that enables people to live in dignity through income and livelihood support, empowerment and improved systems of basic services. Its aim is to progressively realise social protection as an economic right by structuring and integrating social protection. The policy is the overarching framework to ensure social protection impacts. It clarifies social protection objectives at different stages in the country's development. It recommends the enactment of a dedicated social protection law.

²¹ Ghana Social Protection Policy www.ghana.gov.gh/.../2060-gender-ministry-validates-draft-social-protection-policy.

The policy development process began in January 2014. The Ministry of Gender Children and Social Protection (MoGCSP) in partnership with the Local Government Service Secretariat, Development Partners and Civil Society Organisations, adopted a comprehensive consultative process to ensure the participation of every stakeholder.

The goal of the social protection policy is to achieve a well-coordinated, cross-sectoral social protection system that enables people to live in dignity through income and livelihood support, empowerment and improved systems of basic services. It is to promote the well-being of Ghanaians through an integrated platform of effective social assistance, social and productive inclusion, social services and social insurance. Its purpose is to close the inequality gap and ensure total inclusion for every citizen and progressively realise social protection as an economic right in accordance with the Constitution.

The social protection policy gives authority, provides legitimacy, stability and consistency. It shapes practice and programmes, informs and teaches, creates consensus, and provides a framework for collaboration. It is also multi-levelled to reach assorted targets.

The social protection policy has six chapters that include the introduction, the country context, situational analysis, policy focus and direction in chapters one to four and the policy phases and measures, implementation framework and institutional relationships for policy delivery in chapters five and six.

The policy recommended the enactment of a dedicated social protection law that will provide for progressive realisation of social protection as an economic right and outline the institutional structures for co-ordination. The legislation will provide legal identity to the Livelihoods Empowerment Against Poverty Programme and the School Feeding Programme and make provision for the finance of social protection. It has become necessary to secure social protection by law to ensure that a modern system of social protection has significant impact on incomes, equitable development and increased access to social services for the extremely poor and vulnerable. This law will facilitate the work of the MoGCSP by providing direction for the development, co-ordination, monitoring and evaluation of social protection.

Drafting Process and Role of Legislative Counsel

Public policy analysis considers what actions would best serve the public interest in a given situation. Legislative counsel are generally not concerned with the formulation of policy, but are aware of process to produce it.

The problem, people, process, price tag and programme are the feature of the policy. Legislative counsel have a role to play to transform policy into law and clarify policy objectives.

The methodology used by legislative counsel to translate the policy into a range of enforceable provisions that met the requirements of the rule of law involved a staged

approach. These stages are also described in legislative texts such as *Thornton's Legislative Drafting*.²²

The first stage is the analysis stage. Legislative counsel must understand the policy and proposals, carry out background research, clarify the instructions and initiate consultations to refine the policy and proposals.

The second stage is the design stage where legislative counsel advise on the practicability of the proposals and decided on the legislative approach in order to work out the legislative scheme and requirements to prepare the plan for the overall structure of the legislation. At this stage, the existing laws related to social policy were examined to determine if changes and reform were required.

The third stage is the drafting of the legislative text followed by the revision and redrafting after consultations.

The fourth stage is the scrutiny stage where the draft is checked for accuracy, certainty and consistency to remove errors of substance, ambiguities of syntax and expression. Through the stages of the legislative process, it is the responsibility of legislative counsel to be the manager. Legislative counsel led the facilitation of the consultative workshops and ensured that deadlines in the legislative timetable were met.

Legislative counsel are best advised to recommend the pre-legislative scrutiny of the proposed draft by legislators to the sponsors and warn that the quality of the law can be compromised if it is rushed through the legislative process. The progress of the legislative text through the enactment process must be monitored and the inevitable changes throughout the consultative process must be incorporated in the text by legislative counsel. Tactically, expectations for the completion of the law should be lowered and then exceeded, though the ultimate fate of the draft law is beyond the scope of legislative counsel. The sponsor pilots the Bill through the enactment process to obtain the approval of the executive for the Bill to be laid in Parliament after which it proceeds through the legislative process.

The responsibilities of legislative counsel do not end with the drafting of legislation, especially in the field of social policy. It is necessary for legislative counsel to advise the sponsor of legislation to have an advocacy strategy to lobby for the enactment of the legislation.²³ The key element of the strategy is to have a plan to build consensus on the proposed law. This can be done by the organisation of zonal consultative workshops held throughout the country to which stakeholders from the public and private sector are invited. A media advocacy plan is also to be recommended for print, radio and television. The support of faith-based organisations can be enlisted and the support of civil society should

²² H. Xanthaki, *Thornton's Legislative Drafting*, 5th ed. (Bloomsbury Professional: West Sussex, 2013) at 145-161.

²³ Estelle Matilda Appiah, (2013) "Quality rights and mental health in Ghana", (2013), 12 *Journal of Public Mental Health* 224.

be solicited. Partnerships can be formed with human rights activists and special focus can be given to certain groups.

Draft Legislation to Implement the Policy

The provisions in the law had to capture the progressive realisation of social protection as an economic right and provide for the institutional structure and decentralised structures for implementation. The legislative scheme comprised the following:

- framing provisions that were the general principles of social protection;
- primary rules that were the institutional requirements; and
- implementation rules that related to decentralisation, eligibility and application.

There were also dispute settlement provisions on appeals and compliance rules on abuse, termination, suspension, cancellation and the refund of benefits. The draft law included finance rules to provide the funds to implement and enforcement rules which provided penalties for offences. The final provisions were on miscellaneous matters.

Legislative drafting principles on style were used for clarity of expression, directness and conciseness in language. Plain language was used, mindful of the audience and users of the legislative text. As regards composition, accurate legislative syntax and grammatically sound writing was required to avoid ambiguity.

Finding layout features to help readers locate information posed a challenge since there was a need to de-clutter the main provisions of the law but provide access to ancillary information. The law makes use of schedules that contain technical provisions. The schedules enabled detailed lists of information to be included. These might otherwise be difficult to locate elsewhere, as access to public information is a perennial problem in Ghana as in most developing countries.

Specialised agencies and their roles in social protection are the contents of the First Schedule. The Second Schedule names the flagship social protection programmes. The Third Schedule provides the criteria for social assistance. It lists the categories of vulnerability, provides examples of affected people and describes the social interventions, social protection programmes and social assistance. The Fourth Schedule provides information on the eligibility for social cash grant.

The August 2018 Draft Social Protection Bill has eleven groups of clauses.

The first has the preliminary provisions: the object of the law, its application and social interventions. The objectives of social policy are to strengthen the ability of a person to cope with vulnerability and the progressive realisation of economic and social rights. What social protection seeks to achieve is access to basic health care and minimum income security.

The second group of clauses states the key responsibilities of the MoGCSP as policy direction and collaboration. The fourth and fifth group of clauses deal with the institutional

arrangements. A top-down approach is adopted with the Inter-Ministerial Co-ordinating Committee for Social Protection at the pinnacle and the Social Protection Inter-Sectoral Technical Committee. The Social Protection Inter-Sectoral Technical Committee comprises middle level technocrats and is chaired by the public service head of the MoGCSP, the Chief Director. It comprises scheduled officers on social protection from sector ministries and representatives from the NDPC,²⁴ CHRAJ²⁵ and the ministry responsible for local government and rural development. Persons such as development partners, civil society operatives and representation from a research and training institute can be co-opted.

Decentralisation and social protection are provided for in the sixth, seventh and eighth group of clauses. The social protection policy recommended that implementation responsibilities be through decentralised structures that use the regional co-ordinating councils, district assemblies and their departments. The clauses in the Bill outline the composition, object, functions and administration of the District Social Protection Committee and the Community Social Protection Committee. The role of the Community Social Protection Committee is to sensitise the community about social protection programmes. It is also to identify eligible beneficiaries, assist in the collection of data and case management at the local level.

Social grants and eligibility are dealt with in the ninth group. They are based on the eligibility criteria in the Third Schedule and the application process is detailed. The abuse, termination, suspension or cancellation of a social protection grant has been stipulated in this group. Issues around confidentiality and the preservation of personal data as well as incidents when social protection lapses and requires review are also provided for.

The tenth group is on financial and related provisions. Funding is to be from budgetary allocations and a Social Protection Trust Fund is to be established. This is intended to be a mechanism complementary to provision from the Consolidated Fund²⁶ of moneys voted by Parliament for the conduct of social protection. The Fund will enable moneys to be mobilised from public and private sources. It is envisaged in the policy as a credible, transparent mechanism into which voluntary contributions can be made. The Fund will serve as a pool to support innovative social protection interventions. This will also be in line with the financing for development considerations to support the UN Sustainable Development Goals. The significant sources of revenue for the Fund are the government,

²⁴ National Development Planning Commission.

²⁵ Commission on Human Rights and Administrative Justice.

²⁶ Article 175 Public funds of Ghana

175. The public funds of Ghana

The public funds of Ghana shall be the Consolidated Fund, the Contingency Fund and such other public funds as may be established by or under the authority of an Act of Parliament.

contributions from the *Heritage Fund under the Petroleum Revenue Management Act 2011* (Act 815)²⁷ and a percentage from the National Lotteries.

The final group of clauses is on offences and miscellaneous provisions. Offences culled from the policy include making false statements, representations, failure to disclose, inducement and failure to comply with the law. Conflict of interest is also addressed. It occurs where a public officer acquires a pecuniary or other interest that could conflict with the proper performance of the functions of that person concerned with a social protection benefit.

The way forward

General elections were held in Ghana on the 7th of December 2016 leading to a regime-change from the National Democratic Congress (NDC) to the New Patriotic Party (NPP). The Sixth Parliament was prorogued in December 2016. The NPP took office for the First session of the Seventh Parliament of the Fourth Republic on January 7th, 2017. The Social Protection Bill was not introduced in Parliament by the NDC before Parliament was prorogued.

For the draft Bill to progress further, the NPP government must own it. It is currently engaged in further consultation to review and revise the draft Bill for validation. This process has included a pre-legislative scrutiny meeting with the Constitution, Legal and Parliamentary Committee of Parliament in particular. It will then be submitted to the Cabinet by the Minister for Gender, Children and Social Protection for approval to be introduced in Parliament.

It is the hope of stakeholders that the Republic of Ghana will have a Bill on social protection passed by the Seventh Parliament. 2020 is however an election year and the ruling party will be engaged in the election process to ensure a second term. It therefore remains to be seen if the Bill will be enacted in 2020.

This social protection legislation is ground-breaking and seeks to provide a safety net in the best interest of the poor and vulnerable in Ghanaian society. It behoves each stakeholder to take a keen interest in its enactment to provide the satisfaction of translating an inclusive policy into a viable piece of legislation.

²⁷ www.piacghana.org.

Plain Language and the Rule of Law: King Sejong the Great and Modern Legislative and Regulatory Drafters

*Michelle Johnson-Weider*¹



Abstract

This paper considers the importance of plain language in achieving the rule of law, which is the principle that both the government and the people of a country should be held accountable through a system of predictable laws and fairly applied justice. It focuses on clear writing and meaningful advance notice as two fundamental elements of the rule of law that are at least somewhat within the control of a legislative or regulatory drafter.

As a historical example of these principles, the paper first examines the efforts of King Sejong the Great of Korea's Joseon Dynasty to create an alphabet that the common Korean people would be able to read and write more easily than the Chinese characters that were being used at the time. King Sejong understood that plain language that can be comprehended by the common citizen is a necessity for laws to be fairly applied. The second part of the paper examines my own experiences with plain language as a

¹ Ms. Johnson-Weider served in the United States Senate Office of the Legislative Counsel for 13 years, with primary responsibility for drafting legislative proposals relating to agriculture and nutrition. She then spent three years as a program analyst for SNAP certification policy at the Food and Nutrition Service before joining the Legislation Division, Office of the General Counsel, at the Department of Health and Human Services. The views expressed in this article are her own and do not reflect the view of any agency of the United States Government. Ms. Johnson-Weider delivered a presentation based on this article at the Sixth International Conference on Legislative Drafting and Law Reform in Washington, DC, on November 14, 2019. The presentation was entitled "So the unlearned may correct themselves: (the absence of) requirements for plain language in Federal drafting".

nonpartisan legislative drafter for the United States Senate and a regulatory drafter for the Food and Nutrition Service of the United States Department of Agriculture.

Table of Contents

Introduction	68
The Rule of Law	68
King Sejong the Great	70
Modern Drafting.....	72
Observations	80
Vision for the Future	80

Introduction

The rule of law is the concept that both the government and the people of a country are held accountable through a system of predictable laws and fairly applied justice. While some definitions of the term take a broad perspective that incorporates the protection of human rights, all definitions seem to agree that the rule of law is possible only when the law is written clearly and publicized in advance of effectiveness. Only then can people know what is expected of them and be able to choose to act accordingly. In this paper, I will argue that clear writing and advance notice can be achieved only when the law is drafted so that the common person in the society governed by the law can understand it.

First I will examine an inspiring historical example of a leader who recognized the need to ensure laws are accessible to the common person: King Sejong the Great of the Joseon Dynasty in Korea. Then I will jump forward to the modern era and use my own experiences first as a legislative and then as a regulatory drafter to illuminate the use of plain language in those contexts. Throughout, I will argue that the rule of law is threatened when the law is so difficult to read that it can only be understood by lawyers and other experts, or those with the wealth or influence to employ those experts to their advantage.

The Rule of Law

Before discussing what the rule of law requires, it is necessary to understand what the rule of law is. The World Justice Project's definition illustrates the broad perspective:

The rule of law is a durable system of laws, institutions, and community commitment that delivers four universal principles:

- **Accountability:** The government as well as private actors are accountable under the law.

- **Just Laws:** The laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights.
- **Open Government:** The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.
- **Accessible & Impartial Dispute Resolution:** Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.²

At the other end of the spectrum, Brian Tamanaha’s narrow definition simply requires that “government officials and citizens are bound by and act consistent with the law”, which he defines as ensuring “a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms.”³

Although these definitions have significant differences, they both require the law to be clear, publicized, and stable. I am interested most in clarity and meaningful advance notice, as these are fundamental elements somewhat within the control of the legislative and regulatory drafter (stability is generally a matter for policy makers and elected officials). The World Justice Project’s Rule of Law Index considers whether a government is “open”, that is, “shares information, empowers people with tools to hold the government accountable, and fosters citizen participation in public policy deliberations.”⁴ The right to citizen participation is almost meaningless without clear and timely publicization of laws and legal rights in a manner and in a written form that can be understood by the common citizen.

Lord Bingham said that the law “must be accessible and so far as possible intelligible, clear, and predictable . . . if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.”⁵ As he acknowledged, many people need help to figure out how the law applies to their particular circumstances. However, there is a meaningful difference between needing professional advice to address a complicated legal matter and needing professional advice to understand laws of wide and general applicability.

² World Justice Project, *What is the Rule of Law?* (Washington, DC) available at <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

³ Brian Tamanaha, “A Concise Guide to the Rule of Law”, *Florence Workshop on The Rule of Law*, ed. Neil Walker and Gianluigi Palombella (Hart Publishing Company: Oxford, 2008).

⁴ World Justice Project Rule of Law Index, *Open Government (Factor 3)*, (Washington, 2019) available at <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018/factors-rule-law/open-government-factor-3>.

⁵ Lord Bingham, “The Rule of Law” (2007), [*66 The Cambridge Law Journal* 67](#) at 70-71.

King Sejong the Great

When the law of a country cannot be comprehended by an ordinary person, its citizens are at the mercy of a professional advisory class that can sell its services to the highest bidder. The full power and flexibility of the law will be available then only to those who are highly educated or can pay. This danger was recognized by King Sejong, who ruled Korea's Joseon Dynasty from 1418 to 1450. Not only did he recognize the necessity of plain language laws, but he worked determinedly to achieve that objective.⁶

At the time King Sejong became king in 1418, Korea had a spoken language of its own but had used the highly complicated Chinese character system for writing for over a thousand years. Chinese has no alphabet; reading and writing require memorizing a different character for each word. There are estimated to be about 50,000 unique characters, none of which contain any pronunciation clues. Reading at even a basic level requires knowing some 3,000 characters.⁷ To complicate matters further, the Korean spoken language is quite different from Chinese, meaning that many Korean words have no corresponding Chinese character. Mastering literacy took years. In the Joseon Dynasty, which was modeled on Chinese Confucian society, the skill was reserved primarily to the highly educated noblemen scholar-bureaucrats called *yangban*.⁸

King Sejong is regarded as the greatest historical Korean leader for his innovation, dedication, and reforms on behalf of his people.⁹ Despite being king of a Confucian society that had been dominated by Chinese culture and written language since 108 BC, King Sejong was not subservient to the Chinese or bound by tradition. Although he himself was a brilliant scholar, he did not believe that the *yangban* should maintain their monopoly on literacy. Rather, he felt that his people were poorly served by not being able to read the laws that governed them or to express their own ideas in writing, which limited their ability to seek official help. He expressed his concerns with a specific focus on the rule of law:

⁶ It is difficult to find English-language translations of original Korean source documents from this time period. The Digital Hangeul Museum (<http://archives.hangeul.go.kr/>) contains extensive records in Korean about the development of the written Korean language, but Google Translate is an unreliable translator. In writing this section of the paper, I have drawn from the following sources: Boye Lafayette De Mente and Laura Kingdon, *The Korean Mind: Understanding Contemporary Korean Culture*, (Tuttle Publishing: North Clarendon, 2017); Ji-young Lee, *The Understanding Korea Series (UKS) 1: Hangeul* (The Academy of Korean Studies Press: Gyeonggi-do, 2013), available at https://intl.ikorea.ac.kr:40666/korean/UserFiles/UKS1_Hangeul_eng.pdf; Marisa Brook and Christine Ro, "The King's Letters" *Damn Interesting*, 8 August 2016, available at <https://www.damninteresting.com/the-kings-letters/>; "In Praise Of: The World's Best Writing System", *Today Translations*: London, May 25, 2016, available at <https://www.todaytranslations.com/news/in-praise-of-the-worlds-best-writing-system/>; and Dina Racoma, "KOREA: Hangeul and the Great Man Who Created It" *The Language Journal*, December 1, 2011, available at <http://www.thelanguagejournal.com/2011/12/korea-hangeul-and-great-man-who-created.html>. Many thanks to my friend Seungrae Cho for his assistance in locating English-language sources.

⁷ *In Praise Of: The World's Best Writing System*, *ibid*.

⁸ Brook and Ro, above n. 6; De Mente and Kingdon, above n. 6 at 340-346.

⁹ He was a remarkably progressive innovator, credited with many advances in diverse fields of study. For example, Racoma, above n. 6; Brook and Ro, *ibid*; De Mente and Kingdon, *ibid*. at 67-68.

Even an erudite person can judge the weight of transgression only after he reviews the law. If so, then how can ignorant people realize the weight of their own transgression and correct themselves? It is impossible to teach all laws to the people. However, why not write down a selective list of major crimes, translate them into Idu and proclaim them to people so these unlearned men and women can realize ways to avoid committing crimes?¹⁰

Idu was one of the writing systems of the time based on Chinese characters and thus still represented an unsatisfactory resolution to the problem King Sejong wanted to address. As he would later write, he felt pity for his people, who were unable to communicate their concerns. To address the issue, King Sejong established a group of scholars who worked in secrecy for three years to develop a new written language.¹¹ The King himself actively participated in the task, as did his eldest son. Their goal was to create a writing system with a phonetic alphabet that accurately represented spoken Korean and that the common people could learn easily. One remarkable feature of the new alphabet, eventually called Hangeul, was that the shapes of the consonants were designed to imitate the shape of the mouth, tongue, or lips when pronouncing the relevant sounds. In contrast to the thousands of Chinese characters, Hangeul only had 28 letters, which could be combined to write anything that could be said.¹²

When eventually the secret project was discovered, the *yangban* reacted with predictable disdain. They insisted that Hangeul would be seen as a break with the exalted Chinese language and culture, which would anger China and lower the status of the Korean elite.¹³ King Sejong persevered in the face of opposition, promulgating his new writing system in 1446 and then establishing two publishing offices that soon produced Buddhist, agricultural, and military texts in the new script.¹⁴ Later, Hangeul would be used for books of poetry, human and veterinary medicine, and Confucian teachings, among many other subjects.¹⁵

While Hangeul was quickly popular among those who had been unable previously to acquire the education necessary to learn to write, it was resisted for hundreds of years by the *yangban*.¹⁶ Only in 1894 was Hangeul made Korea's official writing system, ironically in part due to Japanese occupiers who wanted to break the historical connections between

¹⁰ From *Sejongsillok* (the Veritable Records of King Sejong) (lunar November 7, 1432 (Sejong 14)), as quoted in Ji-young Lee, above n. 6 at 27-28.

¹¹ Brook and Ro, *ibid.*, Ji-young Lee, *ibid.* at 27-34.

¹² In modern times Hangeul has come to consist of only 24 letters.

¹³ Brook and Ro, above n. 6.

¹⁴ *Ibid.*

¹⁵ Ji-young Lee, above n. 6 at 72-84.

¹⁶ Ji-young Lee disputes this claim, noting that Hangeul was used for centuries in royal and government writings as well as in legal documents, *ibid.* at 71-72.

Korea and China.¹⁷ Today, both North and South Korea have nearly universal literacy, thanks in large part to the progressive vision of King Sejong, who worked determinedly so that his people would be able to understand the laws that bound them and to communicate their concerns to their government. Through Hangeul, King Sejong ensured that clarity and publicization of laws, as well as citizen participation, were possible throughout Korea, thus furthering the rule of law in very concrete ways.

Modern Drafting

Laws and regulations in the United States are written in English, the spoken and written language taught in our schools and known by most of our citizens. However, the way in which some of this legal language is constructed can make it almost as obscure as if it were written in a foreign language known only by the highly educated. Legislative and regulatory text tend to be lengthy and complicated, relying heavily on cross-references to other laws and regulations as well as on specialized areas of knowledge. Laws that amend other laws through pinpoint cut-and-bite amendments may be impossible for anyone to understand without creating a redlined version of the amended law. While much of this complexity is due to the highly technical nature of the underlying subject matter, some of it is due to constraints placed on the drafter. Still more is a result of the fact that of the many people responsible for most American legislative drafting, almost no one is concerned with ensuring that the average citizen can understand the drafted language.

It is not my intent to hold modern drafters to the standard of King Sejong, who literally created an entirely new writing system to ensure plain language legal drafting was possible in his country. Modern legislative and regulatory drafters are typically civil servants required to follow the drafting traditions and stylistic preferences of their government and particular office or agency. More confining, however, are the institutional and political realities that prevent drafters from fully employing all of the plain language techniques available to them. The professional drafter never “owns” the text she writes. Each legislative or regulatory draft is undertaken on behalf of a client and subject to a review process, both of which impose objectives and requirements that frequently conflict with even the best drafter’s intention to create an unambiguous and widely comprehensible draft. However, once understood, these realities can be approached with a newfound resolve to change them to encourage plain language throughout Federal legislation and regulations.

Plain language

Countless articles and books have been written about plain language. It is not my intent to duplicate that work here. For this article, it suffices to examine a few definitions and basic practices. The *Plain Writing Act* of 2010 defines plain language to mean “writing that is

¹⁷ However, the Japanese would later ban the teaching of the Korean language entirely and require Japanese to be used in schools and all publications: Racoma, above n. 6.

clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience”.¹⁸ That is a serviceable definition but undeniably vague. I prefer outcome-based definitions. For instance, the [plainlanguage.gov website](https://www.plainlanguage.gov/) states that “written material is in plain language if your audience can find what they need, understand what they find, and use what they find to meet their needs”. An additional step brings into focus the goals of the entire legal system being envisioned. The United Kingdom’s Office of the Parliamentary Counsel speaks not in terms of “plain language” but of “good law” - law that is necessary, clear, coherent, effective, and accessible.¹⁹

Most drafters would likely support these goals while pointing out that the definitions are so broad as to be almost meaningless. I would refer them to the many excellent detailed resources on improving the comprehensibility of legislative language.²⁰ For our purposes, it is sufficient to state that there are certain basic practices that can make drafting easier to understand, such as

- putting the key grammatical and substantive elements of a legislative sentence early in the sentence,
- defining important terms used in substantive provisions and using terms consistently,
- limiting each legislative sentence to one major idea,
- using the active voice and present tense, and
- trying to think through any potential ambiguities to ensure that provisions are not open to multiple interpretations.

None of these practices will solve every drafting complexity, but each can help improve the clarity of legal text.

U.S. legislative drafting

Professional legislative drafters in the U.S. House and Senate Offices of the Legislative Counsel are career attorneys, firmly apolitical and non-policy-making. They are trained to use the U.S. Government Publishing Office Style Manual to ensure that grammar, capitalization, and other conventions are standardized throughout Federal law.²¹ The two offices also have their own drafting guides that specify how attorneys should handle drafting

¹⁸ Section 3(3) of Public Law 111-274 (5 U.S.C. 301 note).

¹⁹ <https://www.gov.uk/guidance/good-law>.

²⁰ For instance, see the Government of Canada, Department of Justice, *Guide to fostering the readability of legislative texts* (available at <https://www.justice.gc.ca/eng/trans/ar-lr/rq-gl/p1.html>) and the Australian Government’s Office of Parliamentary Counsel, *Guide to Reducing Complexity in Legislation* (available at <https://www.opc.gov.au/drafting-resources/plain-language>).

²¹ *U.S. Government Publishing Office Style Manual* (Washington, 2017), available at <https://www.govinfo.gov/app/details/GPO-STYLEMANUAL-2016>.

particular legislative forms and legal citations.²² Legislative drafters with an interest in plain language may be pleased to note that the 1995 version of the House Legislative Counsel's Manual on Drafting Style urges the legislative drafter to organize every draft, use short simple sentences in the present tense, choose words carefully, and ensure that drafts are "written in English for real people".²³ However, certain realities of legislative drafting undermine these goals.

I spent 13 years as an attorney drafter in the U.S. Senate Office of the Legislative Counsel (SLC), where I was the primary drafter for subject matter in the areas of agriculture and nutrition. My clients were Senators and their staff. I approached each request with the goal of making the language as clear and concise as possible, so that my client's policy, if enacted into law, could be interpreted correctly by the relevant administrative agency and, if it should be contested, by a judge. Among other practices, this required defining terms and using them consistently throughout the draft, writing short declarative sentences in active voice and present tense, removing indefinite pronouns, and thinking through any potentially ambiguous provisions to ensure that they were not open to multiple interpretations. Using my toolkit of drafting techniques, I felt it was possible to render even complicated formulas into understandable language.

What my techniques and experience could not overcome, however, was a client's desire for intentional obfuscation. There was a phrase I came to hate more than any other: *highly negotiated*. Countless times I would clean up a draft by eliminating redundancies, adding logical organization, and defining ambiguous terms, just to have my client instruct me to revert back to some or all of the original text because it was "highly negotiated". The clients would almost always agree that my changes had improved clarity and readability; however, they would say apologetically, the original text had been agreed to through hours or days of tortured negotiation with multiple parties and they were afraid that changing even a single word would break the deal.

My best weapon in those cases was to find a clear error, which usually existed somewhere in the original text. Then I could innocently ask, do you really want me to leave this sentence without a verb or fail to fix this internally contradictory reference? Once the client had agreed that, no, that didn't make any sense, I would usually have more success with my further argument that since we already needed to make some changes to improve the language, wouldn't it be a good idea to clean up the rest of the draft so that the client's

²² See, for instance, the HOLC Guide to Legislative Drafting (Office of the Legislative Counsel, House of Representatives: Washington) available at https://legcounsel.house.gov/HOLC/Drafting_Legislation/Drafting_Guide.html.

²³ House Legislative Counsel's Manual on Drafting Style, (Office of the Legislative Counsel, House of Representatives: Washington, 1995) at 5, available at https://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf.

policy would have a better chance of surviving administrative implementation and judicial scrutiny?

I didn't win every argument, however. On one memorable case, when I pointed out some particularly ambiguous "highly negotiated" language, my client informed me that different people were indeed already reading that provision differently – and that ambiguity was exactly what he needed to get the votes to pass the legislation. He was unswayed by my pointing out that passing the legislation would be a short-sighted victory if the agency picked a different interpretation from the one he wanted. These experiences seemed to become more common over the years I worked in the Senate and I found it particularly frustrating to have a client come to me for drafting assistance and then prohibit me from using my expertise to improve the language. I eventually started quipping that I always tried to draft as clearly as possible, unless my client insisted on obfuscation, and then I could obfuscate with the best of them. As a former colleague says, more often than not as you near the end of the drafting process, the politics drives the language. Another former colleague says that she often describes her job as "promoting clarity in the face of adversity".

Additional factors that limit the legislative drafter are lack of time and excessive workload. Lord Bingham wrote that "legislative hyperactivity . . . appears to have become a permanent feature of our governance".²⁴ That is certainly as true in the United States as it is in the United Kingdom. According to the Office of the Law Revision Counsel, during the past 20 years, each Congress has enacted an average of over 6,900 pages of new public laws.²⁵

In the U.S. Congress, the number of requests for drafting assistance has grown dramatically over time, far outpacing increases in the size of the House and Senate Offices of the Legislative Counsel. The SLC, where I worked, requires drafters to create a new file each time a change is made to a draft and keeps an annual record of the total number of files produced.²⁶ The fact that a file was created does not explain whether the legislation involved was a massive new bill or a resolution where the clauses kept changing, but the numbers do help to show the increase in the overall workload of Federal legislative drafters.

I began working at SLC in 2003, during the 108th Congress, when senior attorneys were already talking about how the number of new hires was insufficient to keep pace with the increased workload. During that Congress, SLC prepared nearly 47,000 legislative requests. I left in 2016, during the 114th Congress, when the Office prepared more than 65,000 requests. That's a 38 percent increase in just 13 years. Last Congress, the 115th, SLC prepared just over 72,000 drafts, a jump of more than 6,000. While there have been some

²⁴ Bingham, above n. 5 at 70.

²⁵ Office of the Law Revision Counsel, *About Classification of Laws to the United States Code* (Washington), available at https://uscode.house.gov/about_classification.xhtml.

²⁶ The Senate Legislative Counsel provided workload information (number of requests by Congress) to the author in October 2019.

aberrations, for nearly 30 years the trend has been consistently upward. The more drafting that needs done, the less time a drafter has to carefully consider each individual draft.

At the same time, legislative drafting has become increasingly more time-consuming as Federal statutory law has increased in technical complexity. For instance, I was the primary Senate drafter for two farm bills, major pieces of legislation to reauthorize Federal agricultural programs for five to seven years. It was not uncommon to be asked to draft 300 amendments for the initial markup of the legislation in the Senate Committee on Agriculture, Nutrition, and Forestry, and twice that number for floor consideration of the reported bill. While that work would be split among multiple attorneys, it was frequently an exhausting few weeks or months of near-constant drafting. Needless to say, it was not possible to give one's undivided attention to ensuring that each request was drafted as clearly as it would have been in less overwhelming circumstances.

I want to make one final comment in regards to my time working in the Senate. As I have said, I frequently urged my clients to consider how an agency or judge would read their language if it were enacted and used that consideration as a basis to push plain language, logical organization, and other good drafting techniques. I am saddened to admit that I never once suggested that those techniques were justified on the basis of the regular citizen needing to be able to understand the legislative text. To my knowledge, none of my colleagues or clients ever raised this point either. To the contrary, it seemed to me that there was a general unspoken agreement that legislative language was far removed from the average person. My objective as a professional drafter was to ensure that the administrative agency would be able to interpret the language in accordance with my client's policy; it was up to the agency through the implementation process to ensure that the public would be able to understand any new requirements. The next stage in my career would take me to just such an administrative agency, where I could put that theory to the test.

Regulatory drafting

Depending on the organization of the administrative agency in question, the U.S. agency drafter may be a career employee or a political appointee, a specialist in regulatory drafting or a subject matter expert in the subject of the regulation. At the Food and Nutrition Service (FNS) of the U.S. Department of Agriculture, where I worked for three years as a program analyst in the Supplemental Nutrition Assistance Program (SNAP), regulations were initially developed by career subject matter experts and subsequently subjected to extensive review by regulatory procedure specialists, attorneys in the Office of General Counsel, and senior career and political leaders. My position at FNS primarily involved developing certification policy guidance that interpreted Federal legislation, regulations, and existing FNS policy to address SNAP eligibility issues. I also had the opportunity to work on several SNAP regulations.

I discovered much more support in the Executive Branch for plain language drafting than I had in the Legislative Branch. In part this is because Congress has made multiple attempts to require Executive Branch agencies to use plain language. The *Plain Writing Act* of 2010 intended

“to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.”²⁷ The goal is lofty, with the Act defining plain language to mean “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience”.²⁸ However, the Act is limited in its reach as it specifically excludes regulations and prohibits judicial review of agency compliance with its provisions.²⁹

Regulatory drafting is generally governed by the *Document Drafting Handbook* of the Office of the Federal Register, a 238-page publication that mentions plain language primarily through reference to a companion document entitled *Making Regulations Readable*.³⁰ This 6-page companion document reminds the agency drafter that “plain language saves the Government and the private sector time, effort and money” and helps the public to find and understand requirements so as to “increase compliance, strengthen enforcement, and decrease mistakes, frustration, phone calls, appeals, and distrust of government.”³¹ There is no mention about how plain language can increase citizen participation or strengthen the rule of law. Instead, the document briefly attempts to persuade presumably unenthusiastic drafters that changing how they draft will increase “public productivity and Government credibility” and then dives into technicalities.³²

Several Executive Orders have tried to be more eloquent on the issue of plain language. President Clinton’s Executive Order 12866 on Regulatory Planning and Review described the need for regulations “that are effective, consistent, sensible, and understandable” to achieve multiple goals, one of which is to make the regulatory process “more accessible and open to the public”.³³ Of the 12 principles of regulation established in the Executive Order, the last one requires each agency to “draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising

²⁷ Section 2 of Public Law 111-274 (5 U.S.C. 301 note), available at <https://www.govinfo.gov/content/pkg/PLAW-111publ274/pdf/PLAW-111publ274.pdf>.

²⁸ *Ibid.*, section 3(3).

²⁹ *Ibid.*, section 6.

³⁰ National Archives and Records Administration, *Document Drafting Handbook*, (Washington, August 2018), Revision 1, April 8, 2019), available at <https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf>; *Making Regulations Readable* (Washington), October 1998 Revision, available at <https://www.archives.gov/files/federal-register/write/plain-language/readable-regulations.pdf>.

³¹ *Ibid.* at 1.

³² *Ibid.*

³³ Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (September 30, 1993), accessible at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

from such uncertainty.”³⁴ A subsequent Executive Order on Civil Justice Reform had as one of its purposes “to improve legislative and regulatory drafting to reduce needless litigation”, using such techniques as reviewing for drafting errors and ambiguity, promoting simplification, reducing burden, defining key terms, and using clear language throughout.³⁵ President Obama’s Executive Order 13563, *Improving Regulation and Regulatory Review*, reaffirmed Executive Order 12866 with the intent of ensuring that “regulations are accessible, consistent, written in plain language, and easy to understand”.³⁶

Perhaps the clearest link between plain language, the common citizen, and the rule of law was made in a 1998 Presidential Memorandum specifically requiring agencies to use plain language “to make the Government more responsive, accessible, and understandable in its communications with the public”.³⁷ Unlike the previously cited Executive Orders, the 1998 Presidential Memorandum defined plain language documents as those that have “logical organization, easy-to-read design features, and use . . . common, everyday words, except for necessary technical terms; ‘you’ and other pronouns; the active voice; and short sentences.”³⁸ The Memorandum applied, though with different effective dates, to both general agency documents and to new proposed and final regulations. While the current Administration has not specifically issued guidance around plain language, an official government website (<https://www.plainlanguage.gov/>) run by the Plain Language Action and Information Network (PLAIN) still exists to promote plain language writing in government communication.³⁹

I found that the Executive Branch emphasis on plain language drafting was particularly true in the case of public-facing documents, such as correspondence, website materials, press releases, and guidance for State agency eligibility staff. FNS analysts were encouraged to consider the reading level of any writing intended for a public audience and always think about how headings, logical organization, and bulletpoints could be used effectively to break down complicated material. We were expected to use plain language drafting techniques when preparing briefing materials and policy overview documents for our political leadership. Since leadership’s time is always at a priority, we needed to be able to accurately describe complicated policy in one-page summaries that could help someone with little or

³⁴ *Ibid.*

³⁵ Executive Order 12988, *Civil Justice Reform*, 61 Fed. Reg. 4729 (February 5, 1996), accessible at <https://www.govinfo.gov/content/pkg/FR-1996-02-07/pdf/96-2755.pdf>.

³⁶ Executive Order 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (January 18, 2011), accessible at <https://www.govinfo.gov/content/pkg/FR-2011-01-21/pdf/2011-1385.pdf>.

³⁷ Presidential Memorandum, *Plain Language in Government Writing*, 63 Fed. Reg. 31885 (June 1, 1998), accessible at <https://www.govinfo.gov/content/pkg/FR-1998-06-10/html/98-15700.htm>.

³⁸ *Ibid.*

³⁹ It describes itself as “a group of federal employees from different agencies and specialties” that has been meeting informally since the mid-1990s.

no prior knowledge of a subject in making decisions and even answering questions about the material.

When it came to drafting rules, there were different expectations for different regulatory parts. All rules consist of a preamble (explanatory text describing what the regulatory language does and why) and the regulatory language itself, which is drafted as amendments to existing regulations. A regulatory preamble should be drafted using as much plain language and logical organization as possible to make it understandable to a wide audience, while at the same time containing sufficient detail and rationale so that a judge can determine that the agency had not been arbitrary or capricious in designing the underlying policy. The actual regulatory text itself is more technical and generally would be more difficult for the layperson to understand.

From my perspective, there were two particularly frustrating aspects of being a regulatory drafter. The first was the Document Drafting Handbook itself, which, as a former legislative drafter, I found very counterintuitive. For instance, in legislative drafting, each structural level within a section has its own distinct descriptive reference term, such as subsection, paragraph, clause, subparagraph, and so forth. While these descriptive terms might be considered arbitrary, once you learn the hierarchy, it is easy to determine where you are in a section of text, no matter how long or complicated, and possible to draft very precise cross-references. In contrast, in regulatory drafting, every level within a section is called a paragraph, which makes cross-references incredibly confusing. Level 1 paragraphs are designated with (a), (b), etc., level 2 paragraphs with (1), (2), etc., level 3 paragraphs with (i), (ii), etc., and so forth – but they are all referred to as paragraphs.⁴⁰ I felt that this undermined clarity and accuracy.

My second frustration was that regulatory language frequently suffers from an excess of input. It is not uncommon for several analysts to draft the base rule text and then for more than a dozen subsequent reviewers along the clearance chain to require changes. I am a strong believer in the importance of document review and as a legislative drafter worked with a team that required near universal peer review of all drafts. I also believe that a drafter cannot allow pride of authorship to interfere with the client's requests; ultimately the draft belongs to the client, not the drafter. However, when a draft goes through months of clearance and dozens of versions of redline edits supplied by different reviewers, many of whom have little interest in plain language, there is the very real risk of edits on top of edits leaving the underlying draft confused and disjointed. The longer the review and clearance process takes, the more the cohesive unity of a regulatory draft risks getting lost, subverting the plain language principles that the agency otherwise does try to follow.

⁴⁰ *Document Drafting Handbook*, above n. 30 at 3-33.

Observations

King Sejong was prescient to recognize that the rule of law is not achievable unless the law is drafted so that the common person in the society governed by the law can understand it. His concern was with the writing system used but the same danger exists when legislative and regulatory text becomes so complicated and technical that it is comprehensible only by highly trained experts. This subversion of clear writing and advance notice means that citizens are less likely to understand what is expected of them and less able to communicate their concerns to the government or adjust their behavior accordingly. The full flexibility and privilege of the law becomes reserved to the experts and those who can afford their services.

In my experiences with the U.S. legislative and regulatory processes, I have seen positives in both systems and believe that each could benefit from the best of the other. Professional legislative drafters tend to be more highly trained and experienced in drafting than regulatory drafters, both because professional legislative drafters are required to have a legal education and because their full-time job is drafting, whereas regulatory drafters who are subject matter experts generally have many other duties and only rarely write a regulation. Professional legislative drafters have access to more robust training and mentoring to help them hone their technical drafting skills.

On the other hand, the administrative agencies responsible for regulatory drafting place a stronger emphasis on the need for plain language, and the regulatory drafter, due to her other writing duties and perhaps her lack of a legal background, tends more naturally to consider how to make her writing easy to understand. Additionally, the regulatory drafter frequently has a much greater depth of subject matter expertise than her legislative drafting counterpart. Finally, the regulatory process is strictly governed by a formalized notice and comment process that is intended to engage the citizenry, although how meaningful this engagement is could be the subject of another paper. Unfortunately, regulatory drafters are hampered by being required to follow a highly prescriptive and often illogical drafting handbook, which is more of a hindrance than a help when it comes to plain language drafting.

Vision for the Future

Looking forward, I believe that each of us must do our part for plain language and the rule of law so that as a whole we move Federal-level legislative and regulatory drafting towards greater comprehensibility and accessibility. On the individual level, legislative and regulatory drafters can do much to ensure that the clear writing and advance notice requirements of the rule of law are meaningfully advanced. However, to truly strengthen the rule of law in the United States, it will be necessary to reform both the legislative and regulatory drafting processes, reforms that can begin by pulling from the existing strengths of each system.

An excellent place starting place would be to determine who is actually reading and using our legislation and regulations. The Government of Canada's Department of Justice Guide to Fostering the Readability of Legislative Texts states that "If there is an overriding principle to readability, it is that you must write in order to communicate clearly with the intended readers . . . All other advice is, to some degree, simply an application of this principle."⁴¹ To effectively communicate to our readers, we must first know who they are. During 2012 in the United Kingdom, the Office of the Parliamentary Counsel and The National Archives carried out a remarkable study to try and understand who reads the law, why they read it, and what drafting techniques result in the most comprehensible text. Alison Bertlin's excellent article in the May 2014 edition of the *Loophole* describes these efforts⁴²; I suggest that the United States undertake a similar study.

Once we know why people are reading legislation and regulations, we will have a much better idea of how to make that language accessible. One place to start is already in use by State governments, many of which are quite committed to legislative accessibility. For instance, the New Jersey Office of Legislative Services makes available via publicly accessible webpage, the text of all legislation under consideration by the present and past Legislatures and the full text of the Laws of the State of New Jersey.⁴³ Of course, the Federal-level Congress.gov does this as well. However, New Jersey takes the extra step of making posted legislation more accessible by clearly showing changes to existing law. Federal-level legislative and regulatory text frequently use pinpoint cut-and-bite amendments that are almost impossible to understand without access to a redlined version of the amended law. By contrast, laws in New Jersey are required to be drafted by striking and replacing entire provisions of existing law. Within each replaced section, underlined text shows what has been added and bracketed text shows what has been deleted. Making such redlines publicly available could go a long way to making Federal legislation and regulations easier to understand.

My third recommendation is to expand the responsibilities and authorities of the Office of the Law Revision Counsel (OLRC), which is an independent, nonpartisan office in the U.S. House of Representatives.⁴⁴ The OLRC is responsible for classifying newly enacted provisions of law to the United States Code, based on a determination of whether the new law is "general and permanent". Because of this determination, not every statute passed by Congress and signed into law by the President actually appears in the United States Code. For instance, many reports, studies, and appropriations provisions do not appear in the Code,

⁴¹ Above n. 20.

⁴² Alison Bertlin, "What works best for the reader? A study on drafting and presenting legislation" (2014), 2014-2 *The Loophole* 25, available at <https://www.calc.ngo/sites/default/files/loophole/may-2014.pdf>.

⁴³ Website of the New Jersey State Legislature: <https://www.njleg.state.nj.us/>.

⁴⁴ Office of the Law Revision Counsel, *About the Office* (Washington), available at https://uscode.house.gov/about_office.xhtml.

even though sometimes Congress enacts the same appropriations provision year after year. Tracking down the current status of such a provision can be very challenging, even for legislative experts. For a regular person to determine this status would be extremely difficult. I suggest requiring OLRC to make publicly available every Federal law, not just the “general and permanent” ones, in an easily searchable format, organized by subject matter like the Code itself is.

Fourth, the critical role of the Executive Branch in making Federal law comprehensible for regular people could be accentuated by standardizing specific plain language requirements across the Executive Branch and requiring each agency to write its own plain language guidelines and implement plans to ensure that the guidelines are followed consistently.⁴⁵

As I have shown, the administrative agencies responsible for drafting regulations, State and industry guidance, and generally communicating with the citizenry at large already emphasize the need for plain language.

However, I do not think that the Executive Branch should bear the entire burden of making Federal law comprehensible and accessible. Legislation drafted by the Legislative Branch must be more comprehensible to the average voters who have a tangible interest in the activities of their members of Congress. We cannot have an educated and engaged electorate without the ability of the average voter to understand the laws that Congress is producing. If it is too overwhelming for Congress to incorporate plain drafting principles into all Federal law at one time, we could take a graduated approach to requiring plain language.⁴⁶ US Federal law already contains some plain language requirements relating to specific subject matters, though mostly at the agency level. These could be expanded to Federal legislative drafting. In his book on the rule of law, Lord Bingham wrote that lack of plain language is particularly egregious in certain legal circumstances.⁴⁷ For instance, in criminal law, where misunderstanding of the law can lead to loss of liberty as well as money, it is especially critical that statutory language be generally comprehensible. Additionally, civil law contains rights as well as obligations, and it is of little use for a person to be granted some right if they are unable to understand how to exercise it. Finally, plain language and the rule of law are crucial for the success of commerce and the market economy, for without them, there can be no certainty in contracting or other commercial transactions. Based on these examples, we could begin by ensuring that laws that affect people’s freedoms, rights, and ability to contract be drafted in as plain of language as possible.

⁴⁵ The U.S. Nuclear Regulatory Commission is an example of one agency that already does this: see, Nuclear Regulatory Commission, *Plain Writing Action Plan, Reports, and News* (Washington), available at <https://www.nrc.gov/public-involve/open/plain-writing/nrc-plan-rpts-news.html>.

⁴⁶ I will note, however, that many other English-speaking jurisdictions have successfully incorporated plain language requirements into all of their Federal-level professional drafting for decades. We could learn from their example.

⁴⁷ Bingham, above n. 5.

Finally, I want to reiterate the critical role played by individual Federal-level drafters, who have to do the hard work of drafting complicated language in a comprehensible manner. Professional drafters understand better than anyone the time and effort necessary to prepare clear, concise, and accurate legal language and I understand that adding an additional burden of plain language to the drafting process may seem overwhelming. However, it is my hope to educate individual drafters to consider whether a nonspecialist would be able to understand legislative and regulatory language. On the individual level, drafters can do much to ensure that the clear writing and advance notice requirements of the rule of law are meaningfully advanced throughout the entire drafting process. That individual knowledge can be transferred through training and office drafting policies as well as by strongly advocating to clients for clarity and simplicity.

Along these lines, I strongly advocate for rejection of the so-called “Roman Rule”, a drafting principle that holds that when we are amending old laws we should follow the underlying style in order to maintain stylistic consistency. This is a poor strategy when many old laws will remain on the books for decades to come. We should be using every opportunity we get to make the law easier to read and understand. Ideally we should try to clean up underlying archaic language whenever we have the chance, but at the very least, we should ensure that any new language being inserted into an old law is drafted in the best way possible. I know that drafting extensive conforming amendments is time-consuming and that clients often push back against the addition of what they see as “unnecessary changes” to underlying, established law. But in the long run, cleaned up law provides many benefits to drafters, clients, implementing officials, and interpreting judges, as well as to citizen readers.

Taking the time to improve the law serves clarity, comprehension, and the rule of law far better than perpetuating poorly drafted and badly organized law. The important point is that we need to start somewhere and we need to start now. If we all do our part, we can promote increased clarity and accessibility of the law, wherever it is drafted.

The Practicality of Purposivism: *Smith v Selby*

Yasmin S. Brewster¹



Abstract

Legislation should be updated regularly to reflect what is currently happening in a society. This is particularly necessary in dynamic areas such as the law relating to the family. Where there is a failure to carry out routine law reform exercises, a court, having encountered some difficulty in interpreting and applying an antiquated statute, may adopt the purposive approach to statutory interpretation. This article critically examines the Caribbean Court of Justice's decision in the Barbadian case of Katrina Smith v Albert Selby and its interpretation of the term "spouse" in the Succession Act, Cap. 249.

Table of Contents

Introduction	85
Procedural History	85
The final word	86
The role of the court in resolving an ambiguity	88
Conclusion	90

¹ LLB (Hons) LLM (Legislative Drafting) (UWI), Attorney-at-Law and former Parliamentary Counsel in the Attorney General's Chambers in Barbados. The opinions expressed are the personal views of the author and do not represent those of the Attorney General's Chambers in Barbados. Sincere thanks to Dr. The Hon. Justice Olson Alleyne, Judge of the High Court of Barbados, The Hon Mr. Justice. Jefferson Cumberbatch, Judge of the Court of Appeal of Barbados and former Deputy Dean (Post Graduate & Research) of the Law Faculty, UWI Cave Hill Campus and Mr. Ajamu Boardi, Attorney-at-Law for their encouragement and helpful comments.

Introduction

The role of a judge to interpret and apply the law is viewed as distinct from Parliament's law-making function. This is consistent with the principle of separation of powers. The presumption is that if the language of a statute is clear, then interpretation is entirely secondary to its application to the facts of a case.² To the extent that it permits a judge to examine the context in which an enactment is created, the purposive approach is effective when interpreting statutes based on areas of the law that are constantly changing. One such area is the law governing spousal relationships. Notwithstanding that this area of the law has steadily evolved, there have not always been legislative responses to reflect the evolution. In that regard, former Lecturer in Law at the University of Reading, D. J. Hurst, commented as follows:

...from time to time, perhaps as a result of a Law Commission report, a statute is revised for social, administrative or even juridical reasons... for a statute of any given age a certain kind of problem in construing it has become more acute. The problem concerns what a court is to do when faced with a statutory provision based on a moral or social concept which has become generally unacceptable: often the problem asserts itself as a point of construction where the effect of the provision turns on the ambit of a particular word or phrase...³

It is submitted that the problem of which Hurst speaks is one which was faced by the Caribbean Court of Justice in the Barbadian case of *Katrina Smith v Albert Anthony Peter Selby*.⁴ A close examination of this case will demonstrate how purposivism was used to overcome the problem presented by a dated statute.

Procedural History

Albert Selby died intestate on 11 April 2008. His parents had predeceased him and he had no children. At the date of his death, he was cohabiting with the appellant, Katrina Smith. He was not married to her. Their cohabitation commenced during the month of April 2002. At that time, he was married to another woman. The marriage was subsequently dissolved and a decree nisi was granted on 29 March 2004, which became absolute on 30 April 2004.

Alleyne J (Ag.), as he then was, aligned the apparent intention underlying section 2(3) of the *Succession Act*⁵ with the social reality in Barbados.⁶ The Act provides as follows:

2(3) For the purposes of this Act, reference to a “spouse” includes

² Adam Gearey Wayne Morrison and Robert Jago *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions*, 1st ed. (Routledge-Cavendish: London, 2009) at 103.

³ D.J. Hurst, “The problem of the elderly statute” (1983), 3 *Legal Stud.* 21.

⁴ [2017] CCJ 13 (AJ) [*Smith*].

⁵ Cap. 249 (Barbados).

⁶ *Selby v Smith* [2010] BBHC 14.

- (a) a single woman who was living together with a single man as his wife for a period of not less than 5 years immediately preceding the date of his death;
- (b) a single man who was living together with a single woman as her husband for a period of not less than 5 years immediately preceding the date of her death.

He held that Ms. Smith was the spouse of the deceased, notwithstanding that the deceased was married to another woman for a portion of the five-year period immediately preceding his death. He stated that

...a married man who has separated from his wife and who establishes an enduring relationship with another woman with whom he lives, as her husband, is for all intents and purposes adopting the life of a single person...⁷

He also offered the following alternative line of reasoning, which amounted to a shift from the previous interpretation⁸ of section 2(3):

...it is possible and reasonable to conclude that the adjective “single” which qualifies the terms “man” and “woman” is merely descriptive of a quality which the parties to the relationship must have possessed at the point in time immediately before the death of the deceased and not a state which must have endured for the five year period...⁹

An appeal by the deceased’s brother to the Court of Appeal was allowed. That Court was of the view that the deceased did not fall within the category of single persons, nor was Ms. Smith a spouse within the meaning of section 2 of the *Succession Act*. It stated as follows:

Unlike Alleyne J (ag), this Court prefers to embrace [the] dictum of Williams J, because in our view, it satisfactorily declares the intention of Parliament as to who is a spouse and who is single...

...the language of s. 2(3) is simplicity itself and begs of no borrowed connotation...It is specific as to who is a spouse: a single man/woman living with a single woman/man as husband and wife. It is specific as to the period of this condition of living together: a period of not less than 5 years immediately preceding the date of death.’¹⁰

The final word

Katrina Smith appealed the decision of the Court of Appeal to the Caribbean Court of Justice (CCJ). The primary issue before the CCJ was whether the appellant could be regarded as the spouse of the deceased. Consequently, the focal point of the case was the term “spouse” as defined in section 2(3) of the *Succession Act*.

⁷ *Ibid.* at para. [103].

⁸ The previous interpretation, which was adopted by Williams J in *Kinch v Clarke* [1986] BBHC 17, required the parties to be single for the entire period that they lived together.

⁹ *Selby*, above n. 6 at para. [112].

¹⁰ [2017] BBCA 2 at paras. [47], [62].

The CCJ held that Katrina Smith was the spouse of the deceased. The Court recognized the value of both the literal rule and the purposive approach, which present different methods of ascertaining the intention of Parliament. It identified the dispute in this case as stemming from "...the view that there is a rigid distinction between literal and purposive approaches to the interpretation of statutes..."¹¹ It noted that

...there are some cases where it is perceived that the language of the statute is capable of two or more meanings. It is in such cases that the judge should find the right balance between the two approaches...¹²

The CCJ approved the Court of Appeal's reliance on Lord Bingham's approach to statutory interpretation in *R (Quintavalle) v Secretary of State for Health*.¹³ Lord Bingham was of the following view:

Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose...¹⁴

The Court also reiterated its own position that "...[i]nterpretation involves applying the legislation in an effective manner for the well-being of the community..."¹⁵ It explained that discovering Parliament's intention requires a review of the legislation as a whole and an understanding of its objective, including the social and historical context in which it was enacted.

Prior to 1975 (the year the *Succession Act* came into force), inheritance between partners was based on marital status. The law did not make provision for rights of inheritance in relation to persons living together as man and wife, who were not married to each other. The result was that if one of these persons died leaving no will, the surviving partner inherited nothing from the deceased's estate.

The CCJ was satisfied that the *Succession Act* was created, *inter alia*, to fulfil a social purpose by providing rights of inheritance to categories of persons who were not previously entitled to inherit. In reviewing the statute as a whole, it noted that "a new regime was prescribed giving statutory rights to that class of persons in sections 2(3) and (4), section 102(4) and sections 57 and 58 of the Act."¹⁶

Section 2(3) of the Act defines the term "spouse" to include a single person who is not married to the deceased but who has cohabited with the deceased for at least five years

¹¹ *Smith*, above n, 4 at para. [7].

¹² *Ibid.*

¹³ [2003] 2 WLR 692 (HL).

¹⁴ *Ibid.* at para. [8] as quoted in *Smith*, above n, 4 at para. [8].

¹⁵ *Rambarran v The Queen* [2016] CCJ 2 (AJ) [36].

¹⁶ *Smith*, above n. 4 at para. [15].

immediately preceding death. Section 102(4) precludes a person from inheriting from the deceased's estate where that person, though married to the deceased, did not live with the deceased for at least five years immediately preceding death.

The CCJ settled the interpretation of the term "spouse" as defined in section 2(3) by reconciling that provision with the overall purpose of the *Succession Act*. It identified the legislative intention as establishing a right of the survivor of a non-marital union to inherit from the estate of the deceased. A period of cohabitation, rather than marital status, was considered the foundation upon which this right is based.

However, while it considered the appellant to be the spouse of the deceased, the CCJ made it clear that it was not convinced that the word "single" included a married man who was separated from his wife. It approved the reasoning of Sykes J in the Jamaican case of *Murray v Neita*¹⁷ with respect to the definition of the term "spouse" in the *Property (Rights of Spouses) Act, 2004*. Like Sykes J, the Court was of the view that "married but separated" does not fall within the natural and ordinary meaning of the word "single". If it were the intention of Parliament to recognize a person who is married but separated as single, such an intention would have been explicitly captured in the Act.¹⁸

The CCJ also opined that the legislature made provision in sections 57 and 58 of the *Succession Act* for any rights that may arise out of a non-marital union where one of the parties was married to someone else. These sections recognized "dependants" who were wholly or mainly maintained by the deceased immediately preceding death and vested in them the right to apply for maintenance out of the deceased's estate. The CCJ ruled that:

...Katrina, being a single woman who was living together with the deceased as his wife for a period of not less than five years immediately preceding the date of his death, the deceased, then being a single man who had divorced from his wife, is entitled to the benefit of inheritance as his spouse.¹⁹

The role of the court in resolving an ambiguity

It is rare for a court to explicitly favour a particular rule of interpretation over another. Indeed, the CCJ in this case identified its singular task as ascertaining and giving effect to the true meaning of what Parliament said in the statute. However, it is the purposive approach which sanctions an analysis of the social and historical context in which an Act was created and permits a review of the Act as a whole.

Therefore, even in the absence of an explicit endorsement of the rule, it is apparent that the CCJ, like the learned trial judge, adopted a purposive approach to its interpretation of

¹⁷ JM 2006 SC 82.

¹⁸ *Smith*, above n. 4 at para. [27].

¹⁹ *Ibid.* at para. [30].

section 2(3) of the *Succession Act*. Arguably, the CCJ's interpretation imputed no meaning to the section that it could not reasonably bear. It resolved that

... [a] consequence of the legislation is that where the couple has lived together for more than five years, and the man was married at the date of death, the woman could not take as spouse. The language of section 2(3) is not ambiguous in this regard...²⁰

Implicit in this statement though is an acknowledgement of some ambiguity in section 2(3), albeit that the ambiguity does not pertain to whether a single woman could be the spouse of a married man.

The CCJ declared that "...the assessment of marital status for the purpose of rights under the Act is made immediately preceding the death of the deceased..."²¹ Notably, the Court's interpretation of subsection 2(3), like the trial judge's alternative line of reasoning, represents a departure from what was ascribed to the section hitherto. The former interpretation of section 2(3) required the assessment of marital status to be made over the entire statutory period of five years preceding death. Therein lies the ambiguity.

It is unlikely that the legislature was protecting the sanctity of marriage by requiring the parties to be single for the entire statutory period. The *Family Law Act*,²² which was enacted only seven years after the *Succession Act*, provided for unions other than marriage.²³ Under that Act, while a party to such a union may claim entitlement to a share in the other's property, there is no assessment of marital status, since neither party is required to be single.²⁴ The underlying intention was hardly to disregard the sanctity of marriage, but to make provision for the social reality.

It should be borne in mind that

...[when] determining... the general object of the legislature...the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one...²⁵

The *Succession Act* formally recognized the existence of non-marital unions. It established inheritance rights for surviving parties to such unions. The social purpose of the Act is evident. Consequently, the Parliamentary intention which is most in accord with

²⁰ *Ibid.* at para. [24].

²¹ *Ibid.* at para. [30].

²² Cap. 214 (Barbados).

²³ S.39 defines a union other than marriage as

the relationship that is established when a man and a woman who, not being married to each other, have cohabited continuously for a period of 5 years or more and have so cohabited within the year immediately preceding the institution of the proceedings.

²⁴ The important consideration is the cohabitation of the parties immediately before the institution of proceedings.

²⁵ P. St. J. Langan, *Maxwell on The Interpretation of Statutes*, 12th ed. (LexisNexis Butterworths: Wadhwa Nagpur 2010) at 199.

convenience, reason and justice should be to resolve any ambiguity in the Act in a manner “that would [not] restrict the number of persons [who] would benefit from the provisions of the Act.”²⁶ Such an intention would also render the section more, though not entirely, consistent with the definition of a union other than marriage in the *Family Law Act*.

It is respectfully submitted that insofar as the language of section 2(3) of the *Succession Act* incidentally supports two interpretations, it is not “*simplicity itself*”.²⁷ The section is ambiguous. It may be argued that in these circumstances, efforts to achieve greater clarity ought to be made by Parliament, rather than on the bench. However, a court is not precluded from highlighting an ambiguity and it is difficult to find a salutary lesson, other than *stare decisis*, in denying that it exists. Indeed, it has been said that:

[a] court is not absolutely bound by a previous decision when it is seen that it can no longer be supported. At any rate, it is not so bound when, owing to the lapse of time, and the change in social conditions, the previous decision is not in accord with modern thinking.²⁸

Conclusion

Legislation ought to be reviewed and updated regularly to reflect changes within the society. This is the essence of law reform. In a country where there is no Law Reform Commission,²⁹ a “detailed and provocative decision”³⁰ is quite useful. Such a decision could be incentive for the legislature to review an Act in an effort to achieve greater clarity and to ensure that statutes do not utilize concepts which have since evolved beyond what was previously accepted.

It is this author’s hope that the acknowledgment of the ambiguity in section 2(3) by the trial judge and the CCJ will prompt the legislature in Barbados to revisit the *Succession Act* and, accordingly, make the necessary amendments. When conducting its review of the Act, the legislature ought also to ponder the societal stance on same-sex families and other more recent developments, to assess whether they should be brought within the range of succession rights. Should the concepts of “man” and “woman” in the legislation be extended to accommodate transgender or transsexual persons? If a rigorous review is not undertaken, a trial court may be faced with another predicament in the near future.

²⁶ *Selby*, above n. 6 at para. [113].

²⁷ *Selby*, above n. 10 at para. [62].

²⁸ *Dyson Holdings Ltd. v Fox* [1975] 3 All ER 1030 (CA) at 1033 (Denning MR).

²⁹ Barbados now has a Law Reform Commission. However, this Commission had not been established when this case was decided.

³⁰ *Selby*, above n. 10 at para. [6].

Book Review

Legal Usage: A Modern Style Guide

Emeritus Professor Peter Butt, published by Lexis Nexis Butterworths, Chatswood, New South Wales, Australia, 2018

Reviewed by Bilika H. Simamba¹

In the Preface to this book, Professor Butt states that the reason for writing it is that most lawyers lack formal training in legal usage. And this, he rightly states, is because legal educational institutions in Britain and most Commonwealth countries rarely teach legal usage in any structured way. He goes on to say that, as a result,

many law students emerge from their educational chrysalis with a style that mimics the usage of the only role models they have encountered – academics, text writers and judges – many of whom also never systematically studied the elements of good legal writing.

This, he further observes, leads many graduates with the assumption that ‘good’ legal usage is formal, academic, dense and sterile, packed with passives, word strings and redundancies.

Upon graduation, he further notes, those law graduates begin their working careers encountering new role models – peers, partners and managers. But many of these new role models went through the same educational and professional processes. In this way, he concludes, poor legal usage is perpetuated within the legal profession, despite recent efforts to improve the language and style of professional legal writing.

To address this issue, the author states that the book has two broad, linked aims. The first is to catalogue existing legal usage. It does so by topic, phrase and word. The second is to scrutinize each usage. While observing that the existence or otherwise of particular usage is a matter of fact, he also notes the obvious, that ‘good’ usage is a matter of opinion, which is partly objective. However, he posits that the opinion can be tested by two key objective criteria: (1) is the usage technically effective (does it achieve its legal purpose), and (2) is it understandable by what he calls ‘moderately motivated’ readers?

As to the approach to the entries in the guide, they are best described by a verbatim quote from the Preface. There, Professor Butt outlines them as follows:

1. *Legal concepts.* This includes aspects of usage as diverse as ambiguity, deeds, definitions, humour, metaphor, merger clauses, fuzzy law, plain language, recitals, terms of art, and key principles of interpretation.
2. *Practical usage.* Entries cover matters such as the use of abbreviations and acronyms, active and passive voice, brackets, bullet points, citation methods, cross-referencing, fonts and document design, footnotes, gender-neutral language,

¹Instructor, Postgraduate Programme in Legislative Drafting, Athabasca University; Consultant Legislative Counsel; Attorney at Law

numbering systems, punctuation, the use of Latin, structures for legal advice and documents and techniques for editing and proof-reading.

3. *Words and phrases.* These entries discuss major legal terms in current use. The coverage does not purport to be exhaustive – that would take many volumes. But it is sufficiently complete to cover most words and phrases in current legal usage.

As the foundation director of the Centre for Plain Language at the University of Sydney and Past President of *Clarity*, among many accomplishments, Professor Butt is no stranger to plain language. He is also no stranger to writing legal dictionaries, having co-edited the first edition of *Butterworth's Australian Legal Dictionary*, and edited several editions of the *LexisNexis Concise Australian Dictionary*. What makes this work, in a sense, extra special is its foray into the Commonwealth field. In this regard, the entries include mostly examples of usage, drawn from judgments, text writers and legal documents in England, Scotland, Ireland, Australia, New Zealand, Singapore, Hong Kong and South Africa. Canada, a multi-jurisdictional Commonwealth country with easily accessible materials, goes conspicuously unmentioned. This omission is rendered even more noticeable considering that US legal usage is included, though this is said to be only for purposes of comparison. That caveat aside, the inclusion of examples from a wide range of jurisdictions that do not have a dictionary or legal usage work specific to that jurisdiction now have a work that, to a significant degree, fills that vacuum.

In assessing usage, Professor Butt states that where, upon applying the two objective criteria mentioned above, he considers that usage is deficient, he suggests alternatives that are aimed at capturing “legal nuance while communicating clearly”. The aim, he goes on to say, “is not to encourage uniformity of usage, devoid of individuality, but rather usage that communicates with power, precision and panache.” But in doing this he is not overly didactic. He explains that the book,

seeks to encourage legal writers to consider for themselves whether the structure, layout and language of their writing serves the interests of the readers – whether it invites readers into the text or tempts them to switch off and read no further.

The author also states that his recommendations on usage endorse ‘plain English’, which, as he says, requires, among other things, “eliminating archaisms, pruning circumlocution, and seeking to find alternatives for arcane terms of art.” He goes on to make what has become a fairly common prescription, and yet bears repeating, that Latin words or phrases must not be used unless they have become part of standard English. This, he states, is from, “a conviction that law can be written in a language that communicates to the average modern reader, while being concise, precise, and legally accurate.”

As to the entries themselves, they are contained in 700 pages. In dealing with them, he discusses many of the issues in the context of the substantive or procedural law in which they are used. As to my task in reviewing the book, in addition to what has already been said

from a general perspective, I will comment specifically on the perennial issues relating to Latin and gender-neutrality, as well as the recommendations relating to simpler words and phrases.

Regarding Latin, Professor Butt has dealt with not just the more well-known terms among lawyers such as *volenti non fit injuria*, *res ipsa loquitur* and *novus actus interveniens* but numerous others that are in far less common use. And in 2 crisp entries, he also reminds or acquaints us with the fact that LLB and LLM mean *Legum Baccalaureus* and *Legum Magister*, respectively. There are numerous little sometime-forgotten translations such as these in addition to entries which amount to small treatises on certain words and expressions used in law.

Specifically, the entry relating to Latin and its use in legal circles covers 3 pages. In those pages, Professor Butt manages to cover a nutshell history of the language, the need for the reader to understand, precision, continued use of Latin (and cites some extreme judicial instances), the need or otherwise to italicise, as well as plurals. But the most significant part of the entry has to be his 4 guiding principles, upon which there is already agreement among many forward-looking writers. They can be reproduced in part as follows:

1. When the Latin word or phrase has become accepted as English usage, then use it.
2. When the Latin word or phrase can be translated without loss of precision, then translate it.
3. When the Latin word or phrase describes a legal concept that is difficult to translate into English without loss of legal precision or conciseness, use it – but add an appropriate translation.
4. When the Latin word or phrase contains an inherent wooliness or ambiguity, avoid it – just as you would avoid a woolly or ambiguous English word or phrase – and find a more precise English expression.

Regarding gender neutrality, many jurisdictions, at least in the legislative drafting field, have long eschewed writing legal documents in the masculine, though there have been stragglers in the broader Commonwealth. Professor Butt conveniently summarizes the usual issues in this regard with some of his own examples. He notes the divergent views of writers regarding terms that have both a gender-neutral term as well as a gender-specific term. He notes that, in such circumstances, some prefer to use the former while others prefer to use the latter. Altogether, in about 2 pages, he summarises the main issues relating to gender-neutral writing, including literary techniques for achieving this, closing, as with many words and phrases in the book, with references for further reading.

No work on legal usage or legal drafting can be complete without the author's prescriptions on plain language substitutes for words once thought to have acquired respectable antiquity in legal writing. Numerous authors including Garth Thornton, Elmer Driedger, Robert Dick,

Michelle Asprey, as well as Americans Reed Dickerson and Richard Wydick, have had a go at prescribing substitutes, not to say anything about style manuals and handbooks issued by offices of legislative counsel. These prescriptions have done a lot to modernize legal writing. Professor Butt has his own list in an entry on simpler words and phrases from page 574 to 590. It is one of the longest I have seen.

There are other works or dictionaries on legal usage. Lawyers all over the Commonwealth use these in their practice. The writer is no exception. But this is the only work of this kind that I have had the pleasure of reviewing to test its utility to the legal and legislative fraternity. Having done that, I have no hesitation in arriving at two conclusions. First, the book is an exceptional empirical and prescriptive plain language guide. Second, I have no hesitation in recommending it to all law students in the Commonwealth for use both in substantive law and legal practice courses. It will also be a brief and convenient reference in the course of legal or legislative practice.

The book is also a treasure trove of references for the student or practitioner who wishes to pursue further any issues raised in the book, both those that extoll plain language writing and the few that do not. The references cover both legal and legislative drafting. And in making these references, the author sometimes indicates not just the title of the article of course but also parenthetically whether the publication is arguing for or against a particular view. It was also a surprise and certainly not lost on this reviewer that there is a recommendation for further reading on page 178 relating to one of his articles under the title, “The placing and other handling of definitions”.²

I cannot avoid ending this review by referring to Professor Butt’s entry relating to emoticons and emoji in electronic communications. He asks the question whether there is a role for them in legal writing to express an idea or emotion, and answers it by saying “Probably not”. Having said that, he goes on to state that, “if we can take seriously the importance of communication to intended readers, perhaps in some circumstances emoticons and emoji would be effective – but only if they are sufficiently certain.”

As an illustration, he refers to a case decided by Peter Jackson J, sitting – as I found out upon further research, at the Queen Elizabeth II Court at Liverpool – in the case of *Lancashire County Council v M*.³ There, a mother left a message in a caravan saying that the family would be back on 3 August. It had an emoji beside the date. The police found the message and said that the emoji was winking, meaning, according to them, that the mother knew that they would not be coming back. His Lordship did not agree that the emoji was winking and ruled accordingly in relation to the argument at issue.

² (2006), 27 *Statute Law Review* 73.

³ [2016] EWFC 9 [13].

