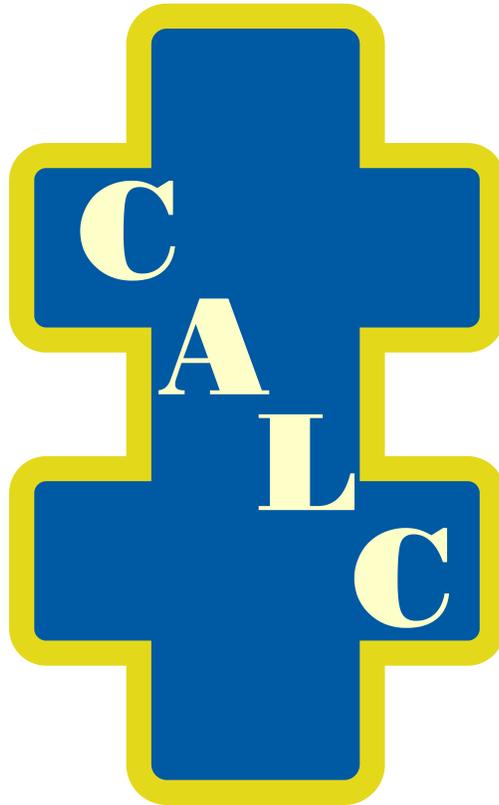


Commonwealth Association of Legislative Counsel

# THE LOOPHOLE



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**THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel**

***Issue No. 2 of 2020***

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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.

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## **Editor's Notes**

Much has changed since the previous issue of the *Loophole* in February of this year. The Covid-19 pandemic has seized our world and, with the uncompromising force of nature, reminded us how our common vulnerability to disease connects us all.

At the CALC Conference in Livingstone last year, few, if any, of us could have predicted how upended the world would be a year later. Yet many of the conference presentations resonate even more forcefully today. This is particularly true of presentations that form the basis for articles at the beginning of this issue dealing with change and innovation.

The first is based on two presentations Daniel Lovric gave, the first at the end of the CALC Conference in Melbourne in 2017 and the second at the end of the Livingstone Conference. The first presentations looked at the future of legislative drafting based on factors such as internationalization, cost-pressures and IT that are already affecting the environment in which legislation is drafted. The second examined innovative responses to these factors. Daniel concludes with a post-script situating his remarks in the current pandemic situation.

Lucy Marsh-Smith's article on Change and Innovation continues the consideration of how to respond to the challenges and pressures facing small drafting offices such as hers in Jersey.

The next article from the Livingstone Conference is John Wilson's dealing with law revision in St Helena, Ascension and Tristan da Cunha in the South Atlantic. He highlights the revision powers deployed to improve the accessibility of laws there.

Rounding out the articles from the Livingstone Conference is Donncha Ó Conmhuí's on bilingualism in drafting laws in the Republic of Ireland. He provides an engaging account of the status of the Irish language and how it influences the work of legislative counsel.

Finally, in a world that has turned to an increased use of extra-parliamentary law-making to address pandemic urgency, Abubakarr Siddique Kabbah's article on subsidiary (delegated) legislation is a reminder of the democratic foundation of law-making and the need for parliamentary oversight of this important form of legislation.

Take care,

John Mark Keyes  
Ottawa, June 2020

## Upcoming Conferences

### ***Making Laws in a Post-Modern World: Are You Ready – CIAJ Legislative Drafting Conference***

The 2020 biennial Legislative Drafting Conference of the Canadian Institute for the Administration of Justice (CIAJ) will take place by teleconference over the course of four weekly sessions beginning **September 10, 2020 and concluding October 1, 2020**.

It will tackle drafting laws in a post-modern world coping with a global pandemic. Information technology is profoundly affecting our world and the way we draft for it. The conference will look at its impact beginning with a keynote address by law and AI scholar Professor Gillian Hadfield. It will continue with sessions on the transformation of law into apps (“law as code”) and drafting to accommodate demands for regulatory flexibility and innovation.

The conference will also look at what is happening in the present with a review of gender-inclusive drafting, developments in legislative interpretation and drafting regulation-making powers. Workshop sessions will also be offered to deepen participant’s practical perspective on these topics. Each day will include a question & answer period.

In addition to Professor Hadfield, other notable speakers include The Honourable Thomas Cromwell and Professor Lorne Neudorf. This conference is a must for those who want to draft legislation in the post-modern world.

Further information about the conference is available at <https://ciaj-icaj.ca/en/upcoming-programs/2020-legislative-drafting/>

### ***Access for All: Plain Language as a Civil Right – Joint Conference Sponsored by Clarity International, the Center for Plain Language, and Plain Language Association International (PLAIN)***

This conference will have two events.

- The first will take place online October 13, 2020 as a one-day engaging and interactive experience for our many international presenters and attendees. This event will celebrate the 10<sup>th</sup> anniversary of the U.S. Plain Writing Act as well as the regulatory acts of other nations.
- The second event will take place in May 2021 as a continuation of the first event. It will be a full-scale international plain language event in Washington DC. It will combine virtual attendance with physical attendance for those who are able to travel.

Further information about this conference is available at <https://accessforallconference.org/>.

# Legislative Counsel – Future Roles and Innovation

*Daniel Lovric<sup>1</sup>*



## Abstract

*This article is based on presentations at the conclusion of the last two CALC Conferences. The first part examines how the role of legislative counsel is likely to develop based on 5 trends currently manifesting themselves in their work environment: internationalization, cost-pressures, information technology (IT), disaggregation, and the volume and complexity of legislation. The second part looks at innovation in legislative drafting, particularly in terms of IT, office processes, drafting technique, office structure, and training.*

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<sup>1</sup> First Assistant Parliamentary Counsel, Australian Commonwealth Office of Parliamentary Counsel, Canberra. This article reflects my own personal views only. It combines presentations at two CALC Conferences. Part 1 is based on a presentation delivered at the Melbourne conference in 2017. Part 2 is based on a presentation delivered at the Livingstone Conference in 2019.

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## Part 1 –Future roles of legislative counsel

When I volunteered to give the talk that formed the basis of this article, I was a bit ambitious in setting the title - “the future roles of legislative counsel”. Trying to predict the future is a risky business, and it is getting even harder. According to the Israeli philosopher Yuval Harari, this is the first time in history when we don’t know what our working lives will look like in 30 years’ time.<sup>2</sup> And the most important part of predicting the future is being able to distance yourself from your predictions in 10 years’ time. I’ll be interested in reading this article again in 2030!

Nevertheless, it’s important for us to look at the today’s trends, and to see how they might affect us in the future. It may be that we have a limited ability to affect those trends. But it is important to have a *strategic* view of the future. Opportunities and choices will come to us unexpectedly, and we need to have a pre-existing strategy on how to deal with them.

In this article, I will look at this issue in two stages. Firstly, I will examine some existing trends that are already affecting legislative counsel. Secondly, I will look at the need for legislative counsel to understand the increasingly complex problems facing government.

### Trends

In a famous article published 7 years ago, Richard Susskind identified 4 existing trends affecting the legal profession.<sup>3</sup> These are as follows:

1. internationalisation
2. pressure on costs
3. information technology
4. disaggregation, that is the increasing specialisation of the profession

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<sup>2</sup> Harari, Y., *Homo Deus: A Brief History of Tomorrow*, (Harvill-Secker: London 2017).

<sup>3</sup> Susskind, R., *Provocations and Perspectives*, A working paper submitted to the UK CLE Research Consortium (Legal Education and Training Review), 2012, <http://letr.org.uk/wp-content/uploads/Susskind-LETR-final-Oct-2012.pdf> , visited 14 May 2020.

In considering the role of legislative counsel, one should also add a fifth, and perhaps the most important trend, that is:

5. increasing volume and complexity of legislation

I'd like to have a look at all of these trends in some detail, with a particular focus on the last two of them.

### ***Internationalisation and pressure on costs***

My own view is that internationalisation will not affect legislative counsel in the medium term, apart from offering us more chances to meet and connect as we do at CALC meetings. Pressure on costs, however, will be an ever-present issue in the next few decades. I spoke on this topic at the CALC Conference in 2013, where I argued that an increasing number of “second level” projects will need to be completed quickly and without the full attention of experienced counsel.<sup>4</sup> Furthermore, pressure on costs may pose a threat to our long-term career structures. It will also create pressure to adopt alternative funding structures, such as time-based charging.

### ***Information technology***

So far as information technology is concerned, I'd really be reckless to try to make predictions. Nobody knows what is coming. However, the second wave of IT innovation has already hit the drafting world. I now do most of my drafting using voice recognition. On one project, I hold all of my meetings with instructors in Sydney, over a dedicated high-resolution video link. Both of these things still seem novel to me, but they may become the new normal. That being said, information technology poses its own risk to the drafting profession. Henry Thring, the first legislative counsel, warned young drafters against the temptation of dictating to shorthand transcribers.<sup>5</sup> He had a good point – newfangled techniques can become a timewasting distraction from the real job of actually thinking.

I also wonder if the data analytics trend will hit drafting offices: as we manage more and more of our workflow through IT databases, there may be pressure to make such databases transparent, at least to other entities within government.

I now move to the main trends of interest to us.

### ***Disaggregation***

Disaggregation is the separation of legal work into component services, and the performance of those services by different providers. Complex services will be performed by highly

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<sup>4</sup> Lovric, D., “A Strategic View of Drafting Training for Tomorrow's Needs”, *The Loophole*, September 2013.

<sup>5</sup> Thring, H., *Practical Legislation*, 3<sup>rd</sup>ed. (Luath Press: Edinburgh, 2015) at 8:

As a detail it may be well to warn the inexperienced draftsman against an intellectual danger incident to the employment of shorthand writers. The essence of business composition is to think before you write, whilst the effect of employing shorthand writers too soon is to induce the novice to write before he thinks.

skilled specialists, while simple services will be supplied as a bulk commodity by others. It is obvious where most lawyers would like to position themselves in this respect.

My own view is that legislative counsel are somewhat insulated from disaggregation, but we will not escape it completely. One can already see this trend in the increasing bulk of rules drafted “out of house”, whether by instructing departments, regulators, or even non-governmental actors such as accounting bodies.

This raises the question of which specialist skills legislative counsel should be promoting. It is not an easy question. If you ask 10 experienced legislative counsel to list the skills that are most important for doing their job you will get 10 different answers. And by a miraculous coincidence each one will list the skills that are their own personal strengths.

But we do have an objective yardstick here. The important skills are the ones that *governments* value. Governments face complex problems that will require ever more sophisticated legislative solutions. This means that they will reward lawyers who understand the reality of these problems – and who can be relied upon to provide sophisticated solutions. They are less likely to reward those who perform bulk, simple tasks. The skills that will be highly valued will be skills in dealing with complexity. Performing bulk, simple tasks is the road to commodity production – a dangerous thing in a world of disaggregation, as it is begging to be managed for greater output and lower costs.

This issue is linked closely to the fifth trend, the increasing complexity and volume of legislation.

### ***Increasing complexity and volume of legislation***

Drafting offices have dealt with this trend in various ways. Firstly, and most noticeably, the size of drafting offices has increased exponentially. According to Francis Bennion, the United Kingdom drafting office only had 4 permanent members in 1930, but had grown to 23 in the 1980s.<sup>6</sup> It now counts about 50 members. Most larger drafting offices around the world can tell the same growth story. Secondly, this growth in size has been accompanied by an increasing emphasis on management. This manifests itself in an increasing managerial focus of the head of office, and in the adoption of increasingly sophisticated work tracking systems, often based on new information technologies. Thirdly, drafting offices have embraced standardisation and quality control, in order better to manage the risk of errors in large workflows.

These approaches are necessary, and have been mostly successful in dealing with increasing *volume* of legislation. However, they do not necessarily deal with increasing *complexity* of legislation. Indeed, as more and more attention is placed on getting a large bulk of legislation drafted, less time is available for analysing its complexities. The risk here is obvious – if legislative counsel do not focus on the complexities of legislation, they may in

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<sup>6</sup> Bennion, F., *Statute Law*, (Oyez Publishing: London, 1980) at. 17.

time be seen to be producers of a commodity, which, as I mentioned earlier, is a dangerous thing in a time of disaggregation.

I'd like to make a short diversion on the topic of standardisation. At the 2015 CALC conference in Edinburgh, Daniel Greenberg and I held a short debate on whether standardisation was a good thing. This was followed by an audience vote, where I estimate that over 95% were in favour of standardisation. This was gratifying, as I had argued the standardisation case. However, this result also made me uneasy, as there is rarely a simple answer to what is in reality a complex question.

I think that standardisation is a great thing in drafting, and necessary. However, it also poses some systemic risks. Firstly, if a standard precedent is wrong, the error will be spread throughout the statute book. Secondly, and more importantly, standardisation can lull drafters into a false sense of security, and discourage analysis of the complexities of particular problem. It is a useful “hammer” – but encourages drafters to see every problem as a nail. Thirdly, and most importantly of all, the easy gains won through standardisation can lead to an attitude of “the more standardisation the better”. This is a tempting, but dangerous view. Standardisation can become an escape from the real issues, as it is often easier to standardise than to deal with the complexity of the real world.

Similarly, criticisms can be made of plain language and innovative drafting devices. I think both of these things are highly valuable. However, they should not become the focus of drafting. The real task of legislative counsel is to understand the real-world problems that governments are trying to address.

This leads me to the next part of this article: the need for counsel to understand complex problems facing government.

### **Need for counsel to understand complex problems facing government**

Before the explosion in volume and complexity of legislation, the legislative counsel's job was quite different. In Henry Thring's day, it seems that counsel were intensely engaged with political and bureaucratic leaders in working out legislative solutions to the problems of the day. Thring himself spent hours alone with top political leaders such as Disraeli and Gladstone.<sup>7</sup> (Apparently Gladstone immersed himself in the detail of a draft, while Disraeli merely suggested a general approach and left it to Thring to work out the details.)

Competent advice in close proximity to real power is a winning combination. Thring built up a reputation as a close and trusted advisor to higher levels of government, and we are still benefitting today from his efforts.

My view is that the key issue for legislative counsel in the future is the extent to which they can maintain this reputation as a close and trusted advisor to government. I doubt that they

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<sup>7</sup> Thring, above n. 5, at 6.

can maintain this reputation simply through producing large volumes of legislation, quality controlling that legislation, and using plain language and innovative drafting devices. A trusted advisor needs to understand the issues facing his or her client. In the future, as legislation becomes ever more complex, legislative counsel need to engage with that complexity, and look beyond the analyses given to them by instructing departments.

This is particularly so in cases where governments have staked their political reputation on legislative reform. Such high stakes projects often deal with taxation, employment, immigration and criminal law. In such cases, governments will reward those who offer accurate substantive advice: technically competent *and* connected to the real world. Consider a hypothetical example of a proposal to remove major anomalies in legislation on criminal process. Is it reasonable to expect that the legislative counsel will have a good knowledge of the law of criminal process, including knowledge of the relevant case law – enough knowledge to question the assumptions behind the departmental instructions, and enough knowledge to avoid writing something that appears transparently wrong to a criminal law specialist?

This harks back to the eternal question of whether legislative counsel are merely wordsmiths. I will not go into that question here. However, my view is that we have an opportunity to show a deeper understanding of underlying issues, and my experience is that instructing departments and others would welcome that approach. I recently spoke to a roomful of accountants and tax lawyers, and suggested that tax law drafters needed a good general knowledge of tax cases and the particularities of tax administration. I was met with disbelief – that is, disbelief that I found it necessary to say something that the audience thought was blindingly obvious.

What does this mean in concrete terms? I am not suggesting that legislative counsel should become policy experts – we have neither the time nor the training for that. However, we can improve our knowledge of the background to legislative proposals. This could mean reading more case law, especially in the core areas of government, such as immigration, criminal law, taxation and labour law. It can also involve something as simple as scanning the media every day in a systematic way. Most importantly, it is a mental attitude that analysis and understanding are far more important than raw productivity in output. Raw productivity is, in the end, not very highly valued. By contrast, legislative counsel can make themselves indispensable to government by offering technical drafting skills *combined* with an in-depth understanding the real-world environment in which legislation operates.

As this article is based on a presentation I gave in Melbourne, it is worth quoting the words of one former Victorian chief parliamentary counsel. Rowena Armstrong suggested that:

[I]t is, I think, very important that the drafter is not a person without experience in other branches of the law. ... if you do not have some hands-on experience in administering the law from the other side, as it were, then I think all your drafting is at

fault. You are not likely fully to appreciate what you are drafting for and the people who have to administer the laws.<sup>8</sup>

I do not agree with this view to the extent that it suggests that only experienced administrators should write legislation. However, I think that there is a core of truth to Rowena Armstrong's remarks. Knowledge of administrative realities is a huge advantage for a legislative counsel.

In the future, legislative counsel will be faced with a strategic choice. Do we write laws as quickly as possible, offering quality-controlled drafting services, together with project management, plain English and innovative drafting devices? Or do we also offer a degree of expertise in the underlying case law and policy – and sometimes question the nature of the proposed solutions? In the end, it is a question of emphasis. Do we emphasise the skills that affect the surface appearance of legislation, or do we emphasise a deeper knowledge and understanding of the underlying issues affecting governments and regulators? To preserve our role as trusted advisor to government, I think it is the latter.

### **Particular challenges facing legislative counsel in the future**

I'll finish off this part of my article by raising a couple of questions or challenges for legislative counsel looking to the future. I don't have any simple answers to these questions, as I don't think there are any. But they are worth thinking about:

- Is there an optimal size of a drafting office? Is bigger always better?
- Are some aspects of drafting work in danger of being seen as a commodity?
- What is it that governments truly value about legislative counsel?

### **Part 2 – Innovation and legislative counsel**

This part of this article is about innovation in legislative drafting: what has been achieved, and what its effects have been. I don't have new innovations to offer, unfortunately. But I think it is important to take a step back from the process of innovation, in order to see where it is leading us. We need to be mindful about the direction in which we choose to innovate, and be careful that, in creating new things, we don't destroy too much of the old.

I'll describe 5 basic kinds of innovation, and examine how they shape a legislative counsel's job both at the office and individual levels.

But firstly, what is innovation?

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<sup>8</sup> Rowena Armstrong, quoted in *Clearer Commonwealth Law*, a report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (Victoria), September 1993 at 83.

## What is innovation?

In my research for this article I have found a number of definitions, most of which are not completely serious. For example: innovation is what happens when you put people in charge who are competent, ambitious and lazy. A cruel definition: innovation is what happens when the older generation retires. Make of these definitions what you will. More seriously, I think that innovation is any kind of conscious and novel change for the better. It involves experimentation and risk, which may sometimes result in failure. Often, innovation requires what management consultants like to call “creative destruction”.

That being said, drafting offices tend to be oases of stability and low risk within government. They are not like a well-known Internet business which used to have the motto: “move fast and break things” – although it would be interesting to work (for a day or two) in a drafting office that did so. Drafting offices offer a stable platform for developing new ideas, and much of their value comes from their reputation for reliability and tradition.

I see that there are 5 kinds of innovation for drafting offices:

1. Innovation involving information technology,
2. Innovation in office processes,
3. Innovation in drafting technique,
4. Innovation in office structure,
5. Innovation in training.

The first 3 kinds, that is, innovation in information technology, office process and drafting technique, all result in offices being able to produce greater volumes of legislation. I call them *volume-based innovation*. I will discuss them now in some detail.

## Innovation in IT

The most visible aspect of volume-based innovation involves information technology. Much of this kind of innovation does not involve drafting as such, but is rather concerned with new publishing techniques. These techniques are changing rapidly – Dylan Hughes’ presentation at the 2019 CALC Conference gave examples of state-of-the art publishing. Such publishing techniques are integrated with online legal databases, and also integrated with document production software. Many offices use sophisticated workflow software: in my office this automatically generates work reports, both for the office and for the Prime Minister’s department.

There are also some forms of IT innovation that help in the actual drafting process. In my own office, for example, special software checks our draft legislation according to a standardised list of issues: this is a primitive form of artificial intelligence that recognises simple and re-occurring problems. In the future we may see more sophisticated AI – at a

session of the 2019 CALC Conference Matthew Waddington showed us some potential future developments here<sup>9</sup> – although it will be hard to progress beyond standardised pattern recognition. In the future there will also be a greater use of videoconferencing and voice recognition in the drafting process.

These innovations all sound great, but we need to stay sceptical about them. Every generation sees new technology or process that is helpful, but does not really address the basic issues. Over a century ago, Henry Thring wrote of the newfangled fashion for shorthand dictation, and warned against the temptation of using it as a substitute for thought and analysis.<sup>10</sup> Incidentally, Thring also advised against taking written notes, arguing that one should commit most things to memory in order to synthesise them properly.<sup>11</sup> I wonder what he would have thought about computers. The more things change the more they stay the same.

### **Innovation in office processes**

Information technology innovations are usually coupled with innovations in drafting office *processes*. These include quality control and checking procedures, and rules about standardising provisions, all of which may be recorded by extensive office documentation. In my own office, this documentation is in searchable electronic form - which is an indication of its length and sophistication. Our document checking algorithms usually refer back to this documentation. Other offices have developed such documentation in the form of wikis.

### **Innovation in drafting technique**

Complementing innovation in information technology and office process is an extensive innovation in drafting techniques. The most important of these is the move to plain language. This is closely followed by the development of new drafting devices such as tables, simplified outlines and diagrams. These innovations in technique have greatly improved the *surface* appearance and readability of legislation. They are also very scalable – increasing efficiency – as such innovations can be reduced to standardised rules and options.

### **Volume-based innovation**

What all of these volume-based forms of innovation share – IT, process and drafting technique – is that they assist drafting offices in producing *more* legislation. Modern legislative counsel can produce more pages per year by following standard processes, often using standard provisions, prompted and facilitated by information technology. As a result,

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<sup>9</sup> See now Waddington, M, “Machine-consumable legislation: A legislative drafter’s perspective – human v artificial intelligence”, *The Loophole*, June 2019 (2019.2) at 21.

<sup>10</sup> Thring, above n. 5 at 8.

<sup>11</sup> *Ibid.*, at 11.

volume-based innovation will be the dominant form of innovation in the next few decades. No manager has ever been criticised for producing an ever greater volume of quality controlled legislation. Such results are very visible and quantifiable, helping to enhance the reputation of an office, at least in the medium term. However, the quantifiable often drives out the important, scalability often drives out quality, and a greater capacity to handle volume can mean a lesser capacity to handle complexity. There are risks in focusing *too* much on volume-based innovation.

The first of these risks is that of *narrowness*. Volume-based innovation might encourage us to have a narrow perspective of the drafting task, focussing on the use of precedents, plain language and standard solutions. Such a focus does not help Governments very much in dealing with the complexity of real-world problems. Governments do not want simple legislative *drafters*, they want expert legislative *counsel*, who have the depth of knowledge to steer them away from legal and political risks. A legislative *counsel* needs to offer subtle solutions that deal with *complexity* – not just simplistic solutions that facilitate volume. Simplistic solutions are a commodity – which, in the long run, will be subject to competition and price pressure.<sup>12</sup> If drafters do not provide *expert counsel*, there are armies of government and private-sector lawyers who would love to step in and do so. It is prestigious and well-paid work. Drafting offices should be loath to relinquish it.

Thus, this risk of narrowness is linked to the risk of *commoditisation*. Volume-based innovation, if applied carelessly, could encourage a view that drafting is all about rearranging words on the page – that is, about producing a low value commodity. If all legislative counsel do is to provide a high volume of quality controlled, plain language text - their jobs will be subject to competition and price pressure in the long term.

The other risk of volume-based innovation is its diversity. Each drafting office tends to develop its own solutions to the same problems in dealing with legislative volume. We all have our own bespoke IT systems, processes and drafting devices. The paradox is this: we have developed dozens of different ways to standardise and streamline.

Arguably, there is a “best” way to standardise: that is, that certain IT applications, office processes and drafting devices will prove to be clearly the best in their class. If a handful of drafting offices adopt a common highly efficient system – which some jurisdictions are already aiming to do – there may be pressures on other offices to opt into this system, especially if it involves cost savings. Really good innovation is usually copied.

One possible bottleneck here is the issue of *ownership*. Innovation can produce intellectual property. So far, the ownership of copyright in software and processes has not been a big issue for drafting offices, so far as I am aware. I hope this stays so in the future.

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<sup>12</sup> See Part 1 of this article.

To sum up, so far as volume-based innovation is concerned, I think that we will see much more of it in the coming decades. It is a clear winner in dealing with political pressure for more legislation. However, we need to keep in mind its risks. Volume-based innovation can create efficient legislation factories – but we need to remember that industrial kitchens usually produce mediocre food. Volume based innovation – if done carelessly – could undermine the role and prestige of legislative drafters, lending them a reputation of providing simplistic solutions to complex problems. This is not the kind of “creative destruction” that I would like to see.

It may be that other forms of innovation do not create the same risks. It is worth taking a closer look at the 4th and 5th kinds of innovation I mentioned earlier, namely, innovation in training and innovation in office structure.

### **Innovation in training and office structure**

Drafting office structures have been changing slowly but fundamentally over the past few decades. Our starting base was something like a barristers’ chambers, where individuals combined their particular skills in a relatively loose association. This structure was always difficult to fit into a modern public service, especially in times of increasing demand for volume. The resulting “innovation” – if one can call it that – was to impose a traditional management structure, gradually replacing drafting autonomy with a powerful head of office, who had varying levels of drafting experience, or perhaps none at all.

This change to a management structure complemented the trend to volume-based innovation. Management structures accelerated reforms in the use of information technology, office procedures, and standardised and novel drafting techniques. Yet, as I mentioned earlier, the need for individual skills remained. These skills are *not* scalable, or able to be standardised. The challenge is to create office structures that balance process innovations with the promotion and development of high level lawyerly skills.

Indeed, much of the value provided by drafting offices is in the individual, idiosyncratic skills provided by particular personalities. A legislative counsel’s greatest value is the way in which they harness their *personal* perspectives and talents to the drafting task. Individual legislative counsel may have particular skills in relationship building and conflict resolution, or a deep knowledge of particular statutes, case law and administrative realities. Instructing departments think that they have struck gold if they encounter one with such skills. However, legislative counsel have these skills, not *because* of volume-based innovation, but rather *in spite of it*. Indeed, they often gain these skills through experience *outside* the drafting office.

How then, can offices innovate to promote these kinds of individualistic, personality-based skills? Standardised procedures and IT systems are, by their nature, of little use here. Individualistic skills have an elusive and unquantifiable nature – although you know them when you see them. I do not have a solution to this problem. However, I can suggest a

necessary step: drafting offices need to *prioritise* innovation at an *individual level*. In other words, legislative counsel should be encouraged to develop unique skills adapted to their own personality and experience. As Michelle Daley said at a session of the 2019 CALC Conference, the priority needs to be people, not systems. Naturally, a base level of standardised skills is essential. But we should be aiming beyond the bare essentials.

Promoting individualistic skills raises the issue of innovation in training drafters. These innovations have been well described by others at the 2019 CALC Conference, so I won't repeat this information here. What I will add, however, is that developing training materials is very hard work: I know this personally from creating my own course at the Australian National University. After seeing Lucy Marsh-Smith's presentation at the 2019 CALC Conference, I have even more work – from now on, no course will be complete without a few comedy videos. Yet, as we acknowledged after her presentation, university courses cannot fully replace on-the-job experience. As with all legal jobs, much of learning is doing.

Yet it is difficult to identify real innovations in on-the-job training for legislative counsel. The gold standard of training still seems to be close supervision by an experienced legislative counsel involved in complex and politically sensitive projects – just as it was 100 years ago. Indeed, the challenge now is just to *maintain* this traditional system, in the face of demands for volume, reduced funding and greater career mobility.<sup>13</sup> Again, I don't have a solution to offer here. It may be that drafting training in the future will be a mix of practical experience and in-house or university courses. My own office has put considerable energy into in-house training, with seminars provided by experienced legislative counsel, and discussion groups for trainees. Furthermore, trainee legislative counsel may have more responsibility to train themselves.

## Conclusion

Drafting offices have some degree of choice in how they prioritise innovation. My argument is that this priority needs to be biased towards individual development. However, there are limits as to how far management can impose innovation from the top. In the end, much future innovation in drafting offices needs to be driven by individual legislative counsel, seeking to grow their personal reputations within government.

## Pandemic postscript

None of those who attended the 2019 CALC conference in Zambia would have guessed that 10 months later our working lives would be transformed by a global pandemic. This transformation has required many changes to our drafting work. In this environment we have no choice but to innovate.

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<sup>13</sup> Lovric, D, 'A strategic view of drafting training for tomorrow's needs', *The Loophole*, Oct. 2013 (2013.3) at 7.

My own drafting experience in March and April 2020 has brought out 2 points for me.

Firstly, while I have argued in this article that drafting offices need to prioritise innovation at an *individual* level, the pandemic drafting experience has underlined the value of volume-based innovation focused on systems and processes. The initial government responses to the pandemic across much of the world involved drafting large volumes of legislation at a very rapid pace. Here, one can be thankful for the procedural and technical innovations of the past few decades, as they gave clear structure to the mechanical aspects of the drafting task in a very pressured environment. This left legislative counsel better able to focus on the more substantive aspects of their work.

Secondly, the need to work at home will bring much innovation, most of it temporary in nature, but some of it creating lasting change. Many of us are experiencing the technical and social challenges of this kind of work – and are developing new ways of dealing with it. This is a fertile ground for innovation (although one that none of us would have wished for). It is far too soon to know which of these innovations will become permanent features of drafting work. In some cases, the processes and systems of drafting offices will be permanently improved. However, each *individual* legislative counsel will also have a chance to see their work from a different angle, and to improve their own working style. In this sense, the current situation offers a great opportunity for innovation at an *individual* level. This kind of innovation may be invisible at an office-wide level, but may prove in the long run to be more valuable than changes to systems and processes. The challenge for drafting offices is to encourage and appreciate these non-visible, non-quantifiable - but highly important - innovations.

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# Change and Innovation in a Small Drafting Office – the Jersey Experience

Lucy Marsh-Smith<sup>1</sup>



## Abstract

*This article discusses innovations in managing a drafting office in Jersey to improve efficiency by encouraging a better free-flow of ideas, making greater use of technology, changing the office staffing structure, raising standards in drafting and better training of instructors. The author concludes by urging other jurisdictions, especially the smaller ones, to look outwards and to benchmark against the very best.*

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<sup>1</sup> Principal Legislative Drafter, Jersey. In relation to many of the innovations discussed in this paper I must acknowledge the considerable assistance I had from Kate Hannah, formerly Assistant Director, Legislative Publications and Systems for the New South Wales Parliamentary Counsel's Office.

## Introduction

This article is loosely based on a talk I gave at the CALC conference in Livingstone, Zambia in which I described the main changes I had made since taking over as head of Jersey's Legislative Drafting Office early in 2018. These were changes designed essentially to improve efficiency but could be categorised as encouraging a better free-flow of ideas, making greater use of technology, changing the office staffing structure, raising standards in drafting and better training of instructors. It wasn't until I heard the talk by Dr. Daniel Lovric a couple of days later that I recognised that his 5 innovations in legislative drafting were broadly the same as mine, and my aim in this paper is to refine the recounting of my practical experiences under the headings of his 5 innovations as well as to reflect on the points he made in that presentation.<sup>2</sup>

## Innovation involving information technology

Jersey was the first jurisdiction, back in the early 2000s, to benefit from WWT4's iLAWS Word templating solution. In 2019 we replaced it with a more sophisticated version of the product, which now incorporates workflow elements. I described at the conference the benefits the templates would bring by greatly speeding up our work by taking formatting largely out of the equation as well as creating dynamic cross-references. The post-drafting processes of creating signing copies for Ministers and *Projets de Lois* for the States Assembly and beyond to Royal Assent are now semi-automated. Hyperlinks to *projets* and amending legislation are now automatically added to versions for legislation published to the website. We are also going to include an automated consolidation option so that we can mark-up a principal Law from which an amending Law will be generated. Once bedded in, the updated template should speed up our work by making formatting so straightforward that the drafters should be able to apply it directly, with little or no need for assistance from our editorial team, and the post-drafting processes should now require very little manual input.

The one note of caution I would make, now that we have had the template up and running for a while, is the importance of testing by users to ensure that everything is working properly before it goes live. This will not only help to eliminate the bugs and minor glitches that one tends to get with any new IT system, but also make sure that the developer has fully understood the user requirements and, where there is a workflow element, every step of the process that is being automated. It is also critical to establish a realistic timeframe for testing and implementation, and not be held captive to developer or other artificial constraints. All this is likely to save both the office's time and that of the developer in the long run, although it may mean that the pre-installation stage is lengthened. This did not happen as it should

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<sup>2</sup> The text of Dr. Lovric's talk is also published in this issue of the *Loophole* at pp. 2ff.

have in Jersey and I was conscious that it made the transition harder for my team than it need have been.

The second IT innovation we are introducing is what I have named project “Domis”. Domis stands for “Drafting Office Management Information System” and was conceived as a way of replacing paper files with an electronic storage system. It includes elements of automated workflow and the ability to have semi-automated time recording, to flag up delays on projects and to generate various lists and reports of interest to management. The inspiration for Domis was the LEGIS system that operates in New South Wales, though Domis is a lot less sophisticated and is basically an adaptation of a system used in private law firms developed by Civica (Prescient Plus). It was therefore an affordable solution for a small office and we benefitted by selecting a product already in use in the Jersey public sector.

A Lean project I undertook a few years ago suggested that the equivalent of the working time of half a drafter was being spent in printing, hole-punching and filing paper copies of our drafting projects. Not only will this time be saved, along with printing and stationery costs, but several manual processes will be eliminated with materials being automatically stored in one place, generation of standard emails and the ability to record time semi-automatically. It will also avoid the need in future to manually record the current state of drafting projects as is currently done. Domis will show the state of play automatically and generate Excel reports to help management monitor the programme and to supply to the government policy team to assist with their record-keeping. This all adds up, we expect, to further significant saving of drafter time and overall better legislative management.

A further innovation introduced in 2019 was the move away from having an annual authorised fixed date revised edition of the Jersey statute book and to instead have the website show current law. In a small jurisdiction it is relatively easy to maintain current law in virtually real time if there is a suitable process in place. We hope that a proposed Legislation Law, inspired by legislation from New Zealand and covering an array of matters relating to the making and publication of legislation as well as placing the office on a statutory footing, will be passed in 2020 making this current law version of the statute book official. Further changes are planned to create ‘point in time’ versions and an improved search engine.

So Jersey is well on its way to having the degree of on-line publishing, workflow software and other IT innovations that Dr. Lovric alludes to in his paper. Alongside this my deputy, Matthew Waddington, continues to promote legislation as code in conjunction with colleagues from other jurisdictions and Jersey is proud to be playing a major role. Matthew’s work was recognised locally when he was a finalist for an Innovation award. We have also recently established a social media presence with both LinkedIn and Twitter accounts that are attracting positive responses, and which form part of the professional profile and development of the office.

## **Innovation in office processes**

Dr. Lovric refers to IT innovations usually being coupled with office process innovations. This is another area where, in aiming to raise overall drafting standards, Jersey has made a few changes. A review of our house drafting style was undertaken at a team “away day” in 2018 and a brief style manual was produced which attempts to standardise certain matters rather than teach best practice. The manual is used electronically by staff, not because of its length or complexity but because it is a living document that we want to update as necessary.

The Jersey office has had a system of peer review for some years, which is a process where a draft law is checked by another drafter, but the recruitment of our first ever Legislation Editor, Heather Mason, in 2019 will now ensure that a different type of check is undertaken before the draft is seen by another drafter. Experience shows that it is extremely difficult to conduct two distinct checks as part of the same process. Drafters naturally focus on legal and drafting points for their check. If it is constantly interrupted by focusing on grammar or technical points such as cross-referencing there is a risk that neither task will be done well. The check by the Editor will address all these matters and make the drafter review much more focused going forward, effecting a further saving of drafter time, as well as hopefully reducing the number of errors in drafts. Legislation Editors are of course common in larger jurisdictions like Australia and Canada but so far have not found a place in the British Isles. They are of course not unknown in smaller jurisdictions and the post was in part inspired by a similar post in Bermuda.

Inspired by innovations in New South Wales and Scotland, the Jersey office has also introduced a wiki, “Saver”. A place where we can save information about all aspects of practice and procedure, the name might suggest an English word, but it comes from the verb “to know” in our native Jerriais language. It is thus a further nod to our colleagues in New South Wales, who named their wiki “Gulbarra” which has a similar meaning in the Wiradjuri language. The wiki is still being developed (indeed, wikis to be effective must always be on the move) but it is already developing into a valuable resource for our office and we encourage other offices to consider whether there a place for a dynamic user-created repository for all their information and resources.<sup>3</sup>

## **Innovation in drafting techniques**

Dr. Lovric’s third innovation complements the first two and relates to innovations in the way we write legislation. Jersey has embraced a plain language style that was further developed at our 2018 “away day”. This style is reflected in our new style manual referred to above and I have impressed on our new Editor that she should encourage drafters to use simple plain words instead of more complicated words or phrases, bearing in mind, of

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<sup>3</sup> I derived further inspiration from Superman’s fortress of solitude where he was able to hear his long-dead father impart large quantities of information stored in crystals, better to equip him for life on earth.

course, that the meaning is paramount. We are also open to the use of tables, formulae and other techniques that may assist with the understanding of legislation and have ensured that our trainee drafter (see below) embraced this approach from the outset and did not rely on past style as indicative of the approach we adopt today.

### **Innovation in office structure**

Dr, Lovric referred to drafting offices changing from having a structure a few decades ago that was something like barristers' chambers to more of a traditional management structure "gradually replacing drafter autonomy with a powerful head of office who had varying levels of drafting experience, or perhaps none at all". This is not the structure we have in Jersey: I am not that kind of leader. However, I have made the structure less flat and more collaborative, keeping my door open when I can and introducing regular team meetings. My most important innovation was to create a trainee drafter post, and hopefully a second one in future, to enable us to foster home-grown legal talent. A view was taken in the past that that it would not be possible to recruit from the local population of only 100,000 people, but this does not hold true today and I am delighted to have local Advocate Jackie Harris on my team, whose swearing-in attracted positive local media interest which should encourage further applicants in the future.

Regarding the rest of the office structure, my main concern was that the ratio between drafting and non-drafting staff was not quite right and that has led to the recruitment of the Editor, to be followed shortly by a second (part-time) Legislation Clerk. The members of the admin team in Jersey are highly valued individuals essential to the effective running of the office. They are key to ensuring that draft legislation gets to where it needs to go in order to be made, as well as to ensuring the website is kept up to date.

Regarding office hierarchy and structure, I take the view that, apart from the drafter in training, all drafters should be regarded as professionally equal when it comes to drafting (and that the different skills of the non-drafting members of the office are equally respected). That is why I opted for peer review rather than sign-off by me as head of the office. However, I am personally accountable for the work of the office and the innovations discussed in this paper are designed to improve both quality and output. Though it is often difficult to find the time, I ensure I do some drafting, though my role is largely to facilitate drafting by others. The job of head of office requires management skills but also a detailed understanding of the work, which in my view can be undertaken effectively only by an experienced drafter.

Jersey's Legislative Drafting Office was for a number of years part of the then Chief Minister's Department, but in 2018/19 it reverted to being a semi-autonomous unit in the States Greffe, Jersey's Parliamentary Office. Historically, the posts of Greffier of the States (the head of the States Greffe) and Law Draftsman (my old title) were combined, but they were separated some years ago and I now report to the Greffier. This makes for an unusual

structure, but for pragmatic reasons it works. As the drafters are responsible for all drafting, including for individual States Members and Scrutiny Panels, location in a non-ministerial Department is arguably more appropriate. The drafting office is too small to be wholly independent administratively, though it regards itself as such professionally. This shields the office in part from some of the mainstream civil service structure but there are nevertheless clear reporting lines. Until recently, everyone in the office reported to me as the head but the Editor now reports to my deputy with the other administrative staff reporting to the Editor. It is likely that the trainee drafter's reporting line will also devolve onto the Senior Legislative Drafter.

In an office of professionals, I try as far as possible to adopt a consultative and collaborative management style. However, with being a leader goes personal responsibility and often that involves taking quick and important decisions and being personally accountable for them. To consult everybody on everything is a way to end up with laboured, or no, progress. Until one is in a management role one may not realise how difficult it is to please or persuade people, especially when introducing quite a substantial amount of change, and there may be a range of matters underpinning a decision that other office members are less familiar with. When delivering this paper at CALC I entitled it "If you build it they will come". That really referred to getting people to accept the move away from the annual revised edition and instead to maintain the website up to date, which in the end really involved just doing it and showing people the results. It takes longer, and is much more challenging, to get a group of highly skilled and independent-minded individuals to buy into one's vision. Everyone has their own views and lack of opposition may happen only for that powerful head of office who simply lays down the rules, which is not me. I have come to accept that it is a necessary part of change that one cannot please everyone, though that should never be a reason not to listen to and address concerns as far as reasonably possible and one should be prepared to invest the time needed to try and bring people on board.

In 2018 we introduced a new system of 4-monthly appraisals which are designed to assess and support each drafter against agreed objectives. All drafters are measured against our stated key objective:

- (1) To prepare draft legislation that gives legal effect to the policy of the Minister or other promoter of it;
- (2) And to do so in a way that is:
  - (a) sufficiently unambiguous as to leave no room for construction other than that intended by the promoter; and
  - (b) sufficiently clear as to be readily understood by the users of the legislation.

Then there are objectives specific to the individual, mostly drafting related, though there may be non-drafting projects or skills that are included from time to time. We measure performance also against the States of Jersey Core Values which apply throughout the

service but which we have adapted to make more relevant to our own work. As well as setting and measuring objectives, the aim of the frequent appraisals is to recognise achievements and offer guidance, support and coaching. The system, with necessary adaptations, applies to non-drafters too. The intention is to improve both drafting standards and output, as well as something very important that contributes to both, staff morale. The opportunity to celebrate achievement is an essential part of the process.

This is all very well but the system has not been as successful as it might because of my workload during in a year of great change. During a major part of the year I did not have the full services of a deputy, which meant that I sometimes struggled to conduct the appraisals on time as well as to put in the right amount of time to discuss regularly with drafters their progress and experiences on major drafting projects. I hope to devote more time to supporting individual team members going forward in recognition that they are responsible for what we deliver, I am merely the facilitator.

### **Innovation in training**

The training of drafters is a relatively new experience for me. Now an instructor on the Athabasca University Diploma in Legislative Drafting, I have come to recognise that there is much to be gained by a formalised programme of study, though I wholly agree with Dr. Lovric that university courses cannot fully replace on-the-job experience. I felt it useful for the trainee drafter to work with all the other members of the team so that she could pick up a range of hints and be exposed to a variety of drafting styles. From those, she will develop her own style. However, I think the best guarantee of a successful outcome is in selecting the right people at the beginning. There are many good lawyers who lack either the aptitude for drafting or the personality that would make them suitable for the demands of the job.

For our trainee recruitment we devised a 3-hour exam testing the candidates' ability to set out the rules of a game, to put old fashioned wording into plain English, to read and interpret legislation and to spot errors in text. No legislative drafting experience was required but the test result gave me significant confidence that the successful candidate was a good fit for the job, and that was long before I discovered her keen interest in punctuation! I wanted to avoid taking a lawyer, who might be very good at their existing role, into an area of work that might not suit them at all.

With more experienced drafters I encourage participation in CALC, including attending conferences. We hold an annual "away day" which has a training element to it and have recently agreed to a series of mutual office visits with the Scottish Parliamentary Counsel Office.

In delivering my talk at CALC I discussed my innovation in training instructing officers. We provide face-to-face group training. Attendees come expecting to endure a dull day. I try to make it interactive by focusing on a fictional scenario, so they spend much of the morning in small groups working up the bare bones of instructions in relation to that scenario and the

afternoon preparing a response to a draft that relates not wholly accurately to a short set of pre-prepared instructions. It gets them thinking. But I also lighten the experience with 2 role-plays, the first one of which is designed to fool them into thinking I am experiencing a moment of personal high drama. However much you tell people that a draft is their legislation, that they are responsible for what goes in it, and that it isn't a good idea just to copy blindly legislation from elsewhere, these messages do not easily sink in. The role-play sketches address this and make it more memorable. The sketches should still be available on the CALC website for those of you who want to play them rather than encourage your inner thespian by developing ones of your own.

### **Concluding Reflections**

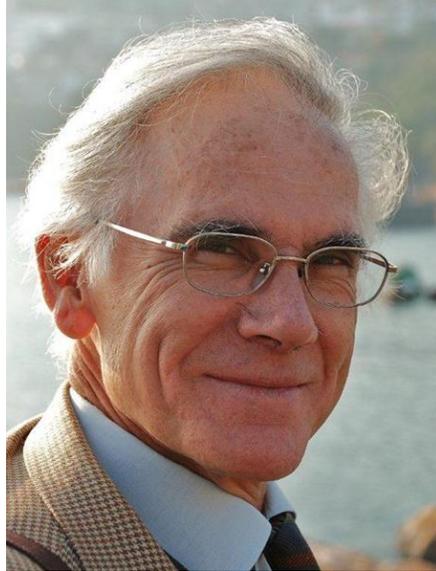
Dr. Lovric's presentation sounds a distinct note of caution in response to these innovations. He points out the naturally cautious and conservative nature of drafting offices and those that work there. He is concerned that there are risks in focusing too much on volume-based innovation, a greater quantity of legislation produced possibly at the expense of quality, which may result in a skating over of the inherent complexity of our work, leading to assembly line drafting. A distinct value of drafters is in their individual skills and personalities, which are not enhanced by focusing on greater volume. He concludes that innovation might be better driven by individual drafters enhancing their personal reputations.

The 5 innovations discussed above need not, I think, stifle the unique skills and qualities we as drafters bring to our work. Output will always be important, but so will innovation in thinking, being open to new ideas and possibilities and developing our unique skillset. We need to adapt to a changing world and cannot sit apart in an ivory tower. It is my hope that by automating processes, enhancing training and innovation in drafting and improving structural coherence and support I will free up more time and better equip my drafters to focus on what they are employed for, the provision of expert drafting services. Technology should be a useful servant to our work; the proponents of legislation as code, I would imagine, do not see it as in anyway undermining the array of skills we all need and therefore I remain optimistic that drafting offices will remain repositories of highly skilled counsel.

In concluding I should acknowledge that much of what I have achieved has its origins in what I have learnt through CALC and the consequent liaison I have had with other drafting offices, particularly those in Australia, New Zealand and Canada. What are innovations for Jersey have been well tried and tested elsewhere and I would encourage other jurisdictions, especially the smaller ones, to look outwards and to benchmark against the very best. I make this point not just in relation to the matters covered by the 5 innovations but also with respect to the highly skilled individuals I have met around the Commonwealth, some of whom I have had the privilege of working with in Jersey.

# Almost God-like Powers – Revising the Laws of St Helena, Ascension and Tristan da Cunha

John F. Wilson<sup>1</sup>



## Abstract

*This article is an expanded version of a presentation at the CALC Conference in Zambia in April 2019. It shows that one solution to the problem of accessibility of legislation is regular revision of the statute book, especially in a smaller jurisdiction. The article illustrates how legislation can be kept up to date by the use of the editorial and revising powers conferred by the legislature. It describes the author's work as Law Revision Commissioner for St Helena, Ascension and Tristan da Cunha using the powers given by the Revised Edition of the Laws Ordinance, 2009. That work unravelled the inter-related legislation of the 3 territories and resulted in the first online law revision for those territories (the '2017 Revised Edition of the Laws').*

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### **The need for law revision**

As Sam Goldwyn said: “Oral agreements are not worth the paper they are written on.” It is generally agreed that written laws are needed for the effective government of a country and to achieve justice and fairness for all. And they should be clear and accessible. As a former Lord Chief Justice said:

There cannot be access to justice, unless the laws that govern us are first written in language that is intelligible and second organised in a way such as the laws on a particular subject can be found in one place and in an organised manner.<sup>2</sup>

As all law drafters know, accessible legislation needs to have as a basis clear concepts set out in good drafting instructions. It needs a coherent structure for both primary and secondary legislation. It needs clear expression, generally achieved these days by the use of what is known as Plain Language drafting. The text of the law needs to be readily accessible with indices and word search capacity. And there needs to be periodic consolidation, codification or revision of laws.

The Law Code of King Cnut, 1020 was drafted by Archbishop Wulfstan of York and written in Old English. It codified existing law and borrowed from the laws of Æthelred and Edgar. It begins, “I desire that justice be promoted and every injustice suppressed, that very illegality be eradicated from this land with the utmost diligence, and the law of God promoted.” But English law has never possessed an authoritative, systematic, or

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<sup>2</sup> The Rt Hon Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, “[The Role of the Judiciary in a Rapidly Changing Wales](#)”, Legal Wales Conference (Cardiff, 11 October 2013).

approximately exhaustive statement, such as was attempted by the compilers of the civil and canon laws, the best known being that commissioned by Napoleon Bonaparte.

There have been spasmodic attempts to codify English law, as with Macaulay's Indian *Criminal Code* and the *Criminal Code* for East Africa produced by James Stephens. The Law Commission for England & Wales has responsibility for recommending codification of aspects of English law, and was responsible for the *Sexual Offences Act* of 2003 and the *Bribery Act* of 2010. It is currently considering the codification of the law on sentencing. But the English statute book on most subjects still consists of a large number of Acts annotated with many amendments, and although they are accessible on the National Archives website, finding the law on a subject is difficult and time-consuming.

### **Keeping the laws up-to-date**

The Inns of Court libraries in London hold hard copy sets of the laws of all the Commonwealth countries, including the Crown Dependencies and British Overseas Territories. It gives me pleasure occasionally to visit the Inner Temple library and look at the Hong Kong laws, the Tuvalu laws, the Montserrat laws, the Grenada laws, some of which I drafted. They are elegantly bound, in cloth or leather, with a gold embossed coat of arms of the country. But they are expensive, and need constant updating.

When I first went to the law drafting division of the AGs Chambers in Hong Kong in 1983 there was a very experienced law clerk, Mr Au Yeung, who painstakingly stuck into every set of the laws slips containing the latest amendments published in the Government Gazette. This was also done by law clerks in law firms all over the Commonwealth until comparatively recently.

Because this process can result in laws with too many stickers, or annotations, there has been for a long time a tradition of Law Revision, updating the whole statute book to restate the law with the amendments incorporated. The powers are usually given by a *REL Ordinance*.

Some Commonwealth countries have permanent law revision commissions, for example, the Cayman Islands, Falkland Islands, Singapore. These are distinct from the Law Reform Commissions that are found in many Commonwealth countries. Others appoint a Law Revision Commissioner to do a one-off revision. This is what Neil Adsett did for a number of Commonwealth jurisdictions for several years. I first came across law revision in Tuvalu in 1978 when Basil Smith was the Law Revision Commissioner. Montserrat also had a revised edition in progress while I was Attorney General during 1979 – 83. There is now a Regional Law Revision Centre which operates from Anguilla and has done law revisions for several Caribbean territories. It was set up in 2008 with the help of Susan Dickson, a legal advisor to the FCO, who at the time said: "This is a wonderful opportunity for the Overseas Territories to be model countries in the region with the most up-to-date and organised laws,

accessible to all and contributing to a more effective administration of justice and rule of law". I hope the law revision work I describe in this paper has continued that tradition.

How much should an updating exercise include a revision of the text? This question has been debated for many years, indeed for centuries. It was something that concerned the compilers of the 1662 *Book of Common Prayer* which replaced the 1545 version.<sup>3</sup> The main benefit of modernising the text is that administrative officers in the jurisdiction find the laws easier to understand and apply. This is particularly important in St Helena, Ascension and Tristan da Cunha where there are no lawyers in private practice and where the administrators are not legally trained, except for the Law Officers and the Public Solicitor. But similar considerations apply to larger emerging jurisdictions and the use of modern language in law revision exercises generally would benefit many common law countries. I hope this paper will show that it is possible to achieve modernisation of the text, while preserving, and indeed clarifying, the original legislative intention.

### **St Helena law revision project**

During 2009-11, I drafted what was in effect a consolidated criminal code for St Helena. This was similar to work I had done for Gibraltar, and subsequently did for the Falkland Islands. The Bills I drafted (a 600 clause Crimes Bill and a 650 clause Criminal Procedure & Evidence Bill) have not so far been enacted in St Helena, but in 2015 I was asked to take on the job of revising the laws, which had last been revised (by Neil Adsett) in 2001. I was appointed as Law Revision Commissioner in January 2016 for St Helena, Ascension and Tristan da Cunha.

The new revised edition was intended to replace the hardback 2001 Revised Edition and to be an online version. It would be accessible to all users of the internet and capable of being updated periodically.

The aim of the law revision project was to produce a version of the statute book of all three territories that is up to date, easily accessible, coherent and complete, and that can be understood by ordinary well-informed readers. This is particularly important in these 3 jurisdictions where there are no lawyers in private practice and where the administrators are not legally trained, except for the Law Officers and the Public Solicitor. For this reason, plain English principles were adopted for the texts, and they were made gender-neutral. This

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<sup>3</sup> See the Preface to the *Book of Common Prayer, 1662* (Eyre & Spottiswoode: London, 1892):

It hath been the wisdom of the Church of England, ever since the first compiling of her Publick Liturgy, to keep the mean between the two extremes, of too much stiffness in refusing, and of too much easiness in admitting any variation from it. For, as on the one side common experience sheweth, that where a change hath been made of things advisedly established (no evident necessity so requiring) sundry inconveniences have thereupon ensued; and those many times more and greater than the evils, that were intended to be remedied by such change.

added considerably to the time taken to revise them, but hopefully has produced a more useful set of laws, while being true to the intentions of the legislature since laws were first enacted locally in 1815.

The Revised Edition went online in November 2017 and can be found at [www.sainthelena.gov.sh/legislation](http://www.sainthelena.gov.sh/legislation). It is the sole authentic text of the law of St Helena, Ascension and Tristan da Cunha.

### Revised Edition of the Laws Ordinance, 1999

The St Helena [Revised Edition of the Laws Ordinance, 1999](#) (the *REL Ordinance*) authorized the preparation of the Revised Edition. It follows a standard pattern for such legislation around the Commonwealth, with the following main section headings:

3. Appointment of Commissioner
4. Complete revised edition
5. Revised booklets
6. Powers of Commissioner
7. Mode of dealing with alterations of substance
8. Omission of certain laws
9. Construction of references to matters affected by the revision
10. Bringing the revised edition into force
11. Rectification of errors
12. Distribution and sale of copies of, and access to, the revised edition
13. Updating of revised edition.<sup>4</sup>

By virtue of the Application of St Helena Laws Ordinance, the *REL Ordinance* applies also to Ascension and Tristan da Cunha.<sup>5</sup>

The key provision for a revision exercise is section 6 of the *REL Ordinance*, which gives the Law Revision Commissioner extensive powers to update and reorganise the texts. I was given the green light to use the revising powers to the full. Law drafters have been heard to comment that the section confers on a Law Revision Commissioner ‘almost godlike’ powers.<sup>6</sup>

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<sup>4</sup> Ordinance 14 of 1999.

<sup>5</sup> See below *Ascension and Tristan da Cunha issues*.

<sup>6</sup> Powers of Commissioner

6. In the preparation of a revised edition, the Commissioner may —  
(a) omit—

## Scheme of the 2017 Revised Edition

The 2017 Revised Edition as it appears on the St Helena Government website (<https://www.sainthelena.gov.sh/government/legislation/>) begins with a General Introduction setting out the rather complicated constitutional relationship between the 3 territories (the same Governor and Attorney General and Chief Justice, but separate legislatures and executive or advisory councils). There are then 7 Annexes which are the items common to all 3 territories:

- the 2009 Constitution;
- Royal Instructions, 2009;

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- (i) all Ordinances or parts of Ordinances which have been expressly and specifically repealed or which have expired or have become spent or have had their effect;
  - (ii) all repealing enactments contained in Ordinances and also all tables and lists of repealed enactments, whether contained in Schedules or otherwise;
  - (iii) all preambles to Ordinances which can, in the opinion of the Commissioner, conveniently be omitted;
  - (iv) all enactments prescribing the date when any Ordinance or part thereof is to come into operation, if in the opinion of the Commissioner such enactments can conveniently be omitted;
  - (v) all amending Ordinances, or parts of such Ordinances, if the amendments made by them have been embodied by the Commissioner in the Ordinance to which they relate;
  - (vi) all enacting clauses;

(b) consolidate into one Ordinance any 2 or more Ordinances in *pari materia*, making the alterations thereby rendered necessary and assigning a date to the Ordinance as may seem to be most convenient;

(c) alter the order of sections or other subdivisions in any Ordinance, and in all cases where it appears to the Commissioner to be necessary so to do, renumber any sections or other subdivisions;

(d) alter the form or arrangement of any section or other subdivision in any Ordinance by transferring words, by combining it in whole or in part with another section or other subdivision or by dividing it into 2 or more subsections or other subdivisions;

(e) transfer any enactment contained in an Ordinance from that Ordinance to any other Ordinance to which the enactment more properly belongs;

(f) divide any Ordinance into parts or divisions;

(g) add a long or short title to any Ordinance which may require it, or alter the long or short title to any Ordinance;

(h) supply, alter or delete marginal notes, headings or subheadings to any section or other part of any Ordinance;

(i) correct grammatical, typographical, and other similar errors in any Ordinance and for the purpose to make verbal additions, omissions or alterations not affecting the meaning of the Ordinance;

(j) shorten or simplify the phraseology of any Ordinance;

(k) make adaptations or amendments [arising from constitutional change, etc.];

(l) make such formal alterations to any Ordinance as are necessary or expedient for the purpose of securing uniformity of expression;

(m) supply tables etc.,

and do all things relating to form and method, whether or not similar to the foregoing, which appear to the Commissioner to be necessary for the perfecting of the revised edition.

- *Territorial Sea Order, 1989*;
- *Revised Edition of the Laws Ordinance, 1999*;
- the omitted laws list (see section 8 of and the Schedules to the *Revised Edition of the Laws Ordinance, 1999* at Appendix ‘C’);
- a list of UK Laws applied to SH, Ascension and TdC;<sup>7</sup>
- judgments of the St Helena Supreme Court and Court of Appeal relating to the Application of Laws Ordinances.

There is then a separate section of the website for each territory, consisting of:

#### *Introduction*

This mentions the status of the territory as a separate jurisdiction, and that the Revised Edition 2017 replaces the 2001 version, and refers to the General Introduction.

#### *Alphabetical list of Ordinances*

This has links to the texts of all extant substantive and subsidiary legislation of the territory, except those items that can be omitted, such as Appropriation Ordinances. As required by section 10 of the *Revised Edition of the Laws Ordinance, 1999*, the texts are stated to be authoritative to 1 November 2017, or a later date if placed on the website later.

#### *Categories List*

Putting the laws into topic groups or categories is a common feature of Revised Editions. The categories I used were based on the ones used in the 2001 Revised Edition, but modified to reflect the current statute book. They do not have legislative effect but help the reader find the law on a particular topic.

#### *Caps. Destination Table*

This is based on the list of ‘Caput’ (Chapter) numbers in the 2001 Revised Edition, 2001. It shows where the equivalents to Ordinances in that revision can be found in the 2017 Revised Edition (or notes that they have been repealed or omitted.).

#### *Chronological Table*

This lists all the Ordinances enacted in the relevant territory, showing the current status of each Ordinance, if it is still law. There is no chronological table for subsidiary legislation as it serves no useful purpose and becomes unwieldy. Subsidiary legislation can be found under the respective Ordinance.

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<sup>7</sup> See below *UK laws applied to St Helena*.

*List of St Helena Laws applied*

This list appears for Ascension and Tristan da Cunha only, and is now historic, as a cut-off date has been applied for the application of St Helena laws (*see* Ascension and Tristan da Cunha issues *below*.) The categories are used also for these lists.

**Style of the Revised Edition**

In producing texts for the 2017 Revised Edition, I made full use of the revising powers mentioned above, as follows:

- Sections and subsections are omitted if repealed, or no longer relevant. (But section numbers remain, unless in a consolidation).
- New subsections as ‘(1A)’ etc. are added to preserve accuracy of cross-references within the Ordinance or in other Ordinances.
- New paragraphs are added as (ea), (eb) etc.; not (eA), (eB).
- Provisos are converted to new subsections, unless very minor or a genuine proviso.
- Two or more Ordinances dealing with a similar topic are consolidated.
- The text is made gender-neutral, in line with the Constitution.
- Archaic text is converted to modern English and Plain English principles are adopted.<sup>8</sup>

The text is presented in a way that makes it easy to read:

- Each Ordinance with its subsidiary legislation is set out as a single consolidated document.
- The relevant Category is shown.
- Every Ordinance and item of subsidiary legislation has a year (i.e. the year it was enacted or made)
- Amendments are listed in italics - Ordinances and L.Ns. separately, in year order.
- Subsidiary legislation is listed in chronological order.

As is usual in a law revision, the 2017 Revised Edition incorporates all amendments made to the Ordinances and subsidiary legislation of the 3 territories since 2001. Legislative amendments are not noted in the text, but can be identified from the Ordinances and Legal Notices (L.N.) listed in the headnotes. Commencement dates are only stated if recent.

Instead of the word indexes that appeared in previous Revised Editions, I added Arrangements of Sections or Tables of Contents respectively added to the texts of all Ordinances or subsidiary instruments that have more than a few provisions or that go over one page.

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<sup>8</sup> See below *Modernising the text* and Appendix A – *Modernising the text*.

Subsidiary legislation includes the year it was made in its title and shows the section under which it was made. It does not include the words of enactment or the name of the maker. Schedules and Forms also show the section under which they were made.

The Revised Edition includes three consolidating Ordinances, which are given the year 2017. It has also renamed a few Ordinances, so for example, the *Gaol Ordinance* becomes the *Prison Ordinance*.

### **Modernising the text**

In revising the texts of ordinances and subsidiary legislation, I aimed to achieve modern standards of clarity and consistency in the wording and the layout, including in Schedules and forms and tables. I tried to use consistent terminology throughout the statute book, except where specialist terms were involved, as in income tax legislation. I also aimed to make format consistent, except in the case of some forms where the original PDF version had to be incorporated.

Penalties have been stated more clearly and consistently; they are stated at the foot of the section that creates the offence, as provided for by the *St Helena Interpretation Ordinance, 1968*. A proposal to enact a *Scale of Fines Ordinance* to simplify the statement of financial penalties and achieve greater consistency and ease of amendment is still under consideration in St Helena.<sup>9</sup>

As mentioned above, I felt it appropriate to make full use of the revising powers in section 6 of the *Revised Edition of the Laws Ordinance, 1999*, and I was given approval to do so.<sup>10</sup>

### **Substantive changes**

Where necessary, texts have been altered to comply with the 2009 Constitution. This includes removing references to the death penalty and to imprisonment for debt. The word ‘spouse’ replaces ‘husband or wife’ and other gender-specific terms are made gender-neutral unless obviously intended to be gender specific. The need for the Governor to consult the respective Council is made clear where necessary.

Other changes that the Revised Edition had to take account of the abolition of the Bank of St Helena and the Government Savings Bank, the change of title of some public officers and changes in the distribution of work between various Council Committees. The revision has also taken account of changes in English criminal law up to the cut-off date of 1 January 2006 under the *English Law (Application) Ordinance, 2005*.

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<sup>9</sup> See below Appendix A for details of how ‘Plain English’ and clear drafting principles were adopted in the texts.

<sup>10</sup> See below Appendix B for examples of how the powers were used to modernise texts that were either archaic or used on old-fashioned drafting style.

As some of the changes that I felt were needed went beyond the revising powers, I included them in an amendment Bill for submission by the Attorney General to the Legislative Council as contemplated by section 7 of the *Revised Edition of the Laws Ordinance, 1999*.<sup>11</sup> The Bill was enacted as the *Law Revision (Miscellaneous Amendments) Ordinance, 2017*<sup>12</sup> and the resulting amendments were incorporated in the revised texts. They included such matters as increasing some penalties, abolishing imprisonment for debt, replacing ‘foreign company’ by ‘overseas’ company, and repealing a whole Ordinance that had never been brought into force. Among other changes to the criminal law, the amendment Ordinance amended the *Criminal Procedure Ordinance, 1975* and the *Police & Criminal Evidence Ordinance, 2003* to bring them into line with the amendments to the *Police & Criminal Evidence Act 1984* and other recent changes in the criminal law of the UK.

### Updating the Revised Edition

As mentioned above, the *Revised Edition of the Laws, 2017* is the only authentic text of the legislation set out in it, by virtue of section 10(3) of the *REL Ordinance* bringing the revised edition into force. Each Ordinance has a footnote saying:

Under section 10 of the *Revised Edition of the Laws Ordinance, 1999* this text is authoritative and is the sole authentic edition in respect of the law contained in it as at [a given date.]

When the website was launched, the date shown on every Ordinance was 1 November 2017, because that was the date declared by the Attorney General in a Gazette notice under section 10(3). However, in order for the texts to be kept up to date, they need to be revised periodically in the light of amendments and new laws enacted in St Helena (or Ascension, or Tristan da Cunha) and of new subsidiary legislation.

Section 13 of the *REL Ordinance* contemplates that there will be periodic updating of a revised edition.<sup>13</sup> The changes can be made to it online (by the Attorney General as Law

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<sup>11</sup> Mode of dealing with alteration of substance

7.(2) If the Commissioner considers that it is desirable that in the preparation of revised editions there should be amendments or additions other than those authorised under the powers conferred by section 6, the Commissioner must draft one or more Bills setting forth such proposed amendments or additions, and submit the draft to the Attorney General who will consider them for submission to the legislature.

<sup>12</sup> No. 14 of 2017.

<sup>13</sup> Updating of revised edition

13. (4) A complete revised edition or booklet contained in the form of a data bank that is accessible by remote computer may be updated by the amendment of part or the whole of that data bank and the consequent replacement of the current version of the data bank.

(5) A replacement, insertion, deletion or amendment pursuant to this section does not have effect unless made pursuant to and in accordance with a notice issued under section 10(3).

(6) A revised edition in whatever format, marked with the latest revision date, is deemed to be the authoritative revised edition to which section 10(4) applies.

Revision Commissioner) rather than being produced as pages to be inserted in a loose-leaf edition, or an annual volume, as used to happen, and as still happens in some jurisdictions. With online publication, the job of updating can be done frequently. Ideally, it should be done whenever a new or amending law is enacted or made, although in practice it is more likely to be on a periodic basis. In St Helena, the updating is done every month (if there is anything to update) by issuing a notice under section 10(3) stating a new date for the coming into effect of the whole Revised Edition, with the new or amended material incorporated.<sup>14</sup>

With the availability of regular updates to the website comes the need to update the Chronological Table which shows all laws enacted in the jurisdiction. Also, under section 13(6) of the *REL Ordinance*, if a new or amending Ordinance is to be authoritative, the date of the revision has to be shown on the revised Ordinance.<sup>15</sup> The date shown on the foot of any new Ordinance should also be updated and the date stated in the General Introduction as the date of the Revised Edition has to be updated.<sup>16</sup>

The date of entry into force of the whole Revised Edition is brought forward whenever new or amending material is placed on the website. The current website version states that it was last updated on 3 February 2020. In fact, the year 2017 is almost irrelevant to the title as the Revised Edition will be correct for every year until some new publication supersedes it.

### Correcting the Revised Edition

With such a complex constitutional set-up, and taking into account the ambitious aim of modernising the text of all the laws of all three jurisdictions, it is not surprising that a few errors or ambiguities crept into the final texts. Provision is made for this eventuality by section 11 of the *REL Ordinance*<sup>17</sup> and a few correction orders have been issued. They

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<sup>14</sup> The following is an example of a recent updating notice:

In exercise of the powers conferred by section 10(3) of the *Revised Edition of the Laws Ordinance, 1999*, I hereby declare as follows:

The Revised Edition of the Laws of St Helena, Ascension and Tristan da Cunha, 2017, set out on the website maintained by the St Helena Government, is updated in accordance with section 13 of the Ordinance by amending the following parts of the data bank accessible from that website:

St Helena:

Marriage Ordinance, 2017

Welfare of Children Ordinance, 2010

These Ordinances show the law as at the revision date noted in the revised text of the respective Ordinances. The updated revised edition comes into force on 8 June 2018 and from that date is, in all courts of justice and for all purposes, the sole authentic edition of these Ordinances.

<sup>15</sup> Updating of revised edition

(6) A revised edition in whatever format, marked with the latest revision date, is deemed to be the authoritative revised edition to which section 10(4) applies.

<sup>16</sup> Since the launch of the Revised Edition website in November 2017 all the work mentioned in these paragraphs has been assiduously done by the St Helena law drafter, Christell Brodrick, whose contribution to the revision of the texts was also considerable.

<sup>17</sup> Ratification of errors

include one which clarifies that ‘the prescribed fee’ in the *Patents (Registration) Ordinance* means prescribed by the Governor in Council, as there was uncertainty as to whether the Registrar also had the power to prescribe fees, as a result of the revision which showed up an ambiguity.<sup>18</sup>

Irrespective of the powers in relation to law revision, Gazetted Ordinances and subsidiary legislation can be rectified by an order under section 32A of the *Interpretation Ordinance* (section 33 in Ascension), and this has been done on a few occasions, both before and after the publication of the Revised Edition.

One error that recently came to light is that in the Ascension *Interpretation Ordinance*, ‘Governor in Council’ is now defined to mean the Administrator for the purposes of applied St Helena laws. That cannot be right for legislative functions, as section 151 of the Ascension Constitution gives legislative functions exclusively to the Governor (after consulting the Island Council.) This could be cured by a section 11 correction order but meanwhile will need to be borne in mind when deciding who has the powers of the Governor in Ascension.

A more significant error involves the term ‘mental disorder’ which I used instead of ‘insanity’ in the criminal procedure laws. I did this because the defence of ‘insanity’ is based on too limited a concept and ‘mental disorder’ is the preferred and politically correct term nowadays. The Butler Committee proposed reform of the law as long ago as 1975, but its proposals have not so far been adopted by the UK Government and insanity is still a defence in the St Helena criminal law. A section 11 correction order has restored the term ‘insanity’ to the St Helena *Criminal Procedure Ordinance, 1975*, leaving open the possibility of amendment in the future.

Under the St Helena *Registration of Births & Deaths Ordinance* as applied to Ascension, the Governor appoints the Registrar of Births and Deaths for Ascension, and the Administrator of Ascension has been so appointed. Under the Ascension *Interpretation Ordinance, 1968* as revised, the Administrator makes acting appointments rather than the Governor. (This was not provided for by a Law Revision (Miscellaneous Amendments) Bill, as Ascension never got round to enacting one.) The change was made in exercise of the revising powers, in view of section 148 of the Ascension Constitution.<sup>19</sup> A problem arose

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11. If any clerical, printing or other error is found in any matter included in a revised edition, the Attorney General may by Order published in the *Gazette* rectify the error in a manner consistent with the powers of revision conferred upon the Commissioner by this Ordinance.

<sup>18</sup> The correction order states:

In exercise of the powers conferred by section 11 of the Revised Edition of the Laws Ordinance, 1999, I hereby rectify the following error in the Revised Edition:

St Helena: Patents (Registration) Ordinance, 1927

In section 4 delete the words “prescribed fee” and substitute “fee prescribed by the Governor in Council by regulations”.

<sup>19</sup> Section 148 states:

because the Administrator was the Registrar and was going to be absent. Should the Administrator make the acting appointment for her own replacement as Registrar? A practical solution was found (appointment of a deputy) but this shows the problems that can arise in updating the laws of a territory that are applied from another jurisdiction.

### **Ascension and Tristan da Cunha issues**

The main constitutional issue that the revision had to deal with was the separation of the legislative powers of the three territories under the 2009 Constitution. It became no longer acceptable that St Helena should legislate for Ascension or for Tristan da Cunha, although it remained acceptable for those territories to apply St Helena law when appropriate. Each of the two other territories has an Application of St Helena Laws Ordinance which says in effect that all St Helena laws that are capable of applying to the territory do so, with necessary modifications.<sup>20</sup> Each Ordinance provides for the territory to designate a cut-off date, in the same way that there is a cut-off date for the application of English law to St Helena. A cut-off date for the application of St Helena to each territory was therefore designated: 1 April 2017 in the case of Ascension, and 1 January 2018 in the case of Tristan da Cunha.

Given the different constitutional arrangements in place since 2001, and the cut-off dates for the application of English laws, I felt it appropriate to set out the text of the applied St Helena laws that still apply in Ascension and Tristan da Cunha. For this purpose, I devised a new legislative creature – the ‘Part B’ Ordinances for Ascension and Tristan da Cunha. These are St Helena Ordinances that are expressly applied to one or both of the territories either by a St Helena law or a law of the territory. Part B texts are intended to show the combined legislative effect of any express application provision, subsequent constitutional changes, the Application of St. Helena Laws Ordinance of each territory, and the powers under the *REL Ordinance*.

The texts are not authoritative, but it is hoped they will be useful in guiding future legislation in the two territories on the subjects covered. They are not a full list of St. Helena Ordinances that apply, as all its Ordinances are capable of applying up to the cut-off date mentioned above, and if not wanted, should be disapplied. The position is made reasonably

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148. Executive authority is to be exercised by the Governor either directly or through the Administrator of Ascension and other officers subordinate to the Governor.

<sup>20</sup> See the *St Helena Law (Application to Ascension) Ordinance, 1988* and the *Application of St Helena Law (Tristan da Cunha) Ordinance, 1987*.

clear by the combined effect of the General Introduction and the footnote to each ‘Part B’ Ordinance.

The General Introduction states:

As each of the three territories can now make its own laws, it is appropriate that St Helena Ordinances which originally applied to Ascension and Tristan da Cunha should become Ordinances of those territories, and they are so identified, with the original year of enactment.

The footnotes to the Part B Ordinances say:

This text is not authoritative but was prepared by the Law Revision Commissioner under section 14 of the REL Ordinance as stating the law at 1 November 2017.

So, if any of the ‘Part B’ Ordinances need to be amended, the drafter has to go back to the original texts. This was why at one stage I suggested that the Revised Edition should be re-enacted as a single statute, at least for Ascension and Tristan da Cunha. That was not accepted, but it should be possible for the respective legislature to re-enact a whole Ordinance, with necessary amendments, based on the ‘Part B’ text.

### **UK laws applied to St Helena**

The Annex to the General Introduction includes a List of UK laws applied to St Helena, Ascension and Tristan da Cunha that apply of their own force or by an Order in Council. The list is fuller than in previous Revised Editions and is divided into 5 categories for ease of reference.<sup>21</sup> However, it is not a full list, which would include several hundred UK laws, in both the civil and criminal areas, as all English laws in force on 1 January 2006 are capable of applying by virtue of the *English Law (Application) Ordinance, 2005*.

All the UK Orders that are expressed to apply to ‘St Helena and Dependencies’ apply also to Ascension and Tristan da Cunha by virtue of the *Overseas Territories (Change of Name) Orders 2011*. There is also a separate category of UK laws that apply to St Helena by virtue of the *English Law (Application) Ordinance, 2005*. Those laws apply also to Ascension and Tristan da Cunha by virtue of the *St Helena Law (Application to Ascension) Ordinance*,

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<sup>21</sup> The 5 Parts of the list are:

Part A: UK Acts applied to Overseas Territories, including St Helena, Ascension and Tristan da Cunha;

Part B: UK Orders and Regulations applied to Overseas Territories, including St Helena, Ascension and Tristan da Cunha;

Part C: UN Sanctions and Restrictive Measures Orders (Specified Countries);

Part D: Civil Aviation and related Acts and Orders;

Part E: Merchant Shipping and related Acts and Orders.

1988 and the Application of *St Helena Law (Tristan da Cunha) Ordinance, 1988* respectively.<sup>22</sup>

Note that any UK law of general application may apply if it is not contrary to a local law, and can be adapted to local conditions. There are also some UK Acts and Orders referred to in St Helena, Ascension and Tristan da Cunha Ordinances, which have the effect given them by the respective Ordinance.

For all these reasons the list of UK laws that apply in St Helena, Ascension and Tristan da Cunha annexed to the Revised Edition is not complete. Nor is it definitive as it has not been sanctioned by the Foreign & Commonwealth Office. There is in fact no definitive list of laws applying to British Overseas Territories kept by HM Government in the UK. The list in the Annex is based on one prepared by the Foreign and Commonwealth Office of the UK Government in early 2017 for the Falkland Islands, supplemented by the *United Nations (Sanctions) (Amendment) Order 2000* and the *Restrictive Measures (Amendment) (Overseas Territories Order) 2012* and Orders applied specifically to St Helena. The list is not however definitive and advice should be taken on the current status of UK laws applying to St Helena, Ascension and Tristan da Cunha.

Also, the list of UK laws applied is not authoritative, and the applicability of some laws may be challenged in court. Unless a UK Act is applied by Order or a local Ordinance (as in the case of the *Tristan da Cunha Abortion Ordinance*) the precise way in which any UK law applies is far from clear, and the only guidance is contained in the few court judgments, extracts from which are included in the Annex to the General Introduction.

This is a problem that is not unique to St Helena, Ascension and Tristan da Cunha but applies to most Caribbean British Overseas Territories, and could well be the subject of a separate study. One territory that has come up with a solution is the Falkland Islands, whose Statute Law Database project has resulted in a list of all UK Acts that apply, with notes on how they apply or should be modified. See the *Falkland Islands Applicable UK Laws Order 2017*.

## Conclusion

Access to legislation is an ongoing preoccupation for any government concerned with the development of democracy and the rule of law and human rights. It is certainly of great interest around the developing Commonwealth. In the Caribbean there is the IMPACT Justice project for the CARICOM countries;<sup>23</sup> legislation of Pacific Commonwealth countries can be accessed on the website of the Pacific Islands Legal Information Institute

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<sup>22</sup> See above *Ascension and Tristan da Cunha issues*.

<sup>23</sup> The Improved Access to Justice in the Caribbean project run by the Caribbean Law Institute Centre of the University of the West Indies, which has published manuals on the legislative process and on legislative style and practices.

(PILLii) [www.paclii.orgwebsite](http://www.paclii.orgwebsite) run by the University of the South Pacific. In the UK there is the [www.legislation.gov.uk](http://www.legislation.gov.uk) website run by the National Archives.

A solution to the problem of accessibility of laws that might be workable even for a small jurisdiction is to have a Statute Law Database run by a full-time Statute Law Commissioner. This solution was adopted by the Falkland Islands under the Revised Laws Project. The project ran for about the same period as the St Helena project, and was governed by *the Law Revision and Publication Ordinance, 2017*. Under that, the Statute Law Database “is an authoritative statement of the legislation applying to or in relation to the Falkland Islands by Ordinance.” It also requires the Statute Law Commissioner to aim “to keep the Statute Law Database up to date at all times”. The Falkland Islands revision resulted in a fully searchable database, but it did not update the language of the legislation, as was done for St Helena.<sup>24</sup>

Some lawyers still prefer to access legislation by using Halsbury’s Statutes of England on hard copy in a law library (now available online, in fact.) Others prefer to read legislation online. But whatever the medium, if the legislative text does not accurately state what the law is at any given time, legal advice is likely to be defective, and law reform cannot happen. This is why Commonwealth jurisdictions have come up with various ways of keeping the laws up to date.

One way is to have regular codification or consolidation of new laws and amending laws on a subject. But even then there needs to be a way of updating the text. Periodic law revision in hard copy has fallen out of fashion for reasons of time and cost. Online publication of the laws, together with regular online updating (and correcting, if necessary) is probably the way ahead, and I hope that my experience with an online law revision for St Helena, Ascension and Tristan da Cunha will show how it can be done.

The Revised Edition, 2017 is not a statute law database in that it is not fully searchable and does not identify the text of every amendment. But it is the sole authoritative statement of a law once the law is included in the website. It replaces the previous Laws website for St Helena and Ascension and constitutes a Laws website for Tristan da Cunha, which did not previously have one. For this reason, law libraries around the Commonwealth, and indeed the world, should be informed that the 2001 Revised Edition has been replaced by the online revision, and that the revision will be periodically updated.

The St Helena law revision exercise was not a straightforward one, as it involved updating the language of all the laws, and converting them into an online format. It required careful navigation of the constitutional relationship between St Helena, Ascension and Tristan da

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<sup>24</sup> See the Falkland Islands Statute Law Database at [www.legislation.gov.fk](http://www.legislation.gov.fk). Another difference between the St Helena project and the Falkland Islands project is that the budget for the Falkland Islands project was rather higher, so that a professional firm was hired to produce the website, whereas in St Helena the Press Office simply converted my Word document texts into PDF format and added them to a section of the existing government website. This was all fitted into the normal work programme, which, as anyone who has worked for a small island jurisdiction knows, can be just as overwhelming as in a large metropolis.

Cunha, and it had to fit in with all the other demands on the very small government staff of the three territories. Despite the complications (indeed, probably because of them) I found the project a fascinating one. The opportunity to use the extensive, ‘almost godlike’ revising powers in the *REL Ordinance* was a great privilege. I hope administrative officers and the public in each of the jurisdictions will find the *Revised Edition of the Laws, 2017* helpful, and that, updated regularly, it will serve for many years.<sup>25</sup>

## Appendix A – Modernising the text

The 2017 Revised Edition:

- makes consistent the divisions into Chapters, Parts and groups of sections.
- avoids long sentences;
- makes one statement per subsection;
- divides section if they are too long;
- avoids provisos - uses ‘subject to’ in a new subsection;
- makes section headings/marginal notes clear, etc.

### **Format, etc.**

- All text is in Times New Roman 12-point, including footnotes.
- The layout is consistent, with section headings to left margin, section numbers indented, sub-sections indented, paragraphs 5-space indented.
- Space is added between subsections, for ease of reading.
- Section heads and numbers and subsection numbers are in bold (except in cross-references).
- Paragraphs are in letters in italics (except for cross-references); sub-paragraphs are in small Roman numerals, not italic.
- Parts headings are in capitals and not italic.
- Headings of Divisions and Chapters are in capitals.
- Cross-headings are in italic
- Numerals for headings are in Arabic rather than Roman.
- There are lines between the ordinance and its subsidiary legislation, between items of subsidiary legislation, between Schedules, between forms, and at the end.
- Dashes instead of semi-colons are used before lists, unless ‘as follows’, in which case a colon is used.
- Capitals for ‘regulation’ and ‘rule’ are only used when referring to the whole document i.e. ‘these Regulations’
- Capital ‘c’ is not used for ‘Court’ unless it is given a special meaning in the document.

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<sup>25</sup> It is pleasing to note that Mark Neale, Crown Counsel in Ascension, has said “I personally haven’t found any issues with the updates and to be honest love that there is now a central, up to date resource where legislation can be found easily.”

- Italics are used for Latin phrases (and French, as in ‘in lieu’); also for ‘Gazette’
- Notes in Forms are in italic.
- References are to e.g. ‘section 9(2)’, not ‘subsection (2) of section 9’.

### **Titles**

- The Long Title to an Ordinance avoids ‘matters connected therewith or incidental thereto’ and says ‘and for connected and incidental matters’ or similar.
- The Short Title (or ‘Citation’ for subsidiary legislation) aims to be helpful to the reader as regards its alphabetical placing etc. E.g. Not ‘Disposal of waste’ but ‘Waste disposal’.
- Brackets are sometimes used to achieve this e.g. ‘Dogs (Licensing) Ordinance, not ‘Licensing of Dogs’.

### **Offences and penalties**

- Says ‘commits an offence’ not ‘shall be guilty of an offence’.
- Says ‘A person’ not ‘Any person’.
- Avoids ‘sandwich’ clauses; uses ‘It is an offence for a person to..’ if more than one offence is created.
- Sets out the penalty at end of section e.g. ‘Penalty: A fine of £xxx.’

## **Appendix B – Examples of revised texts**

Here are two examples of how the original rather archaic text in the laws of St Helena was stated in the Revised Edition, using the powers in section 6 of the REL Ordinance:

### ***St Helena Births & Deaths (Registration) Ordinance, 1853, section 23***

#### **23. Offences by Registrar**

If any Registrar shall refuse, or without reasonable cause omit, to register any birth or death of which he shall have had due notice as aforesaid, and every person having the custody of any register book or certified copy thereof, or of any part thereof, who shall carelessly lose, or allow the same to be injured whilst in his keeping, shall forfeit a sum not exceeding £50 for every such offence.

#### ***Revised version of section 23***

#### **23. Offences**

(1) A Registrar who refuses, or without reasonable cause omits, to register any birth or death of which he or she has had due notice as provided by this Ordinance commits an offence.

Penalty: A fine of £50.

(2) A person who has the custody of any register book or certified copy of a register book, or of any part of a register book or copy, who carelessly loses it, or allows it to be injured while in the person’s keeping, commits an offence.

Penalty: A fine of £50.

**St Helena Land Acquisition Ordinance, 2006, section 4**

**4. Payment for damage**

So soon as conveniently may be after any entry made under section 3 the officer so authorized as aforesaid shall make arrangements for payment to be made for all damage done and, in case of dispute as to the amount to be paid for such damage, he shall at once refer the dispute to the Attorney General whose decision shall be final subject however to an appeal to the Supreme Court.

**Revised version of section 4**

(1) As soon as is convenient after an entry is made under section 3, the person authorised under section 3(1A) must –

- (a) make arrangements for payment to be made for all damage done; and
- (b) in case of dispute as to the amount to be paid for such damage, at once refer the dispute to the Attorney General.

(2) The Attorney General's decision on a referral under subsection (1) is final, subject however to an appeal to the Supreme Court.

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# The question of bilingual legislation in Ireland

Donncha Ó Conmhuí<sup>1</sup>



## Abstract

*When it comes to bilingual legal systems, Ireland is in some respects unusual. The Irish language is afforded an unusually strong position when it comes to divergent meanings between the English and Irish texts of laws. The status of the Irish language influences, directly and indirectly, the role of legislative counsel in the drafting of legislation in Ireland. That role can be better understood by considering the role of drafters in other common law bilingual legal systems.*

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## Introduction

This article focuses on the role of legislative counsel in Ireland's bilingual legal system. A discussion of the Irish language's role in our legal system, and society generally, would require a consideration of matters legal, historical, cultural, political and linguistic (at the very least) in order to be described as adequate, never mind comprehensive. In this short article, however, I hope to at least allow readers to come away with enough of an insight into such matters to appreciate the role of the Irish legislative counsel (such as it is) as regards the Irish language, without being unduly confounded by the myriad contentious but important issues lying just beneath the surface of matters relating to the Irish language.

I present an overview of the challenges and concepts relevant to Irish legislative counsel in our bilingual system. This overview (and it is, out of necessity, a simple overview rather than an exhaustive analysis) will be conducted via-

1. a short description of the historical and social background to the role of the Irish language in our legal system,
2. a basic account of the ways in which the Irish language affects and influences legislative affairs, including the drafting process,
3. an outline of the role of the Office of the Parliamentary Counsel (OPC), by way of a brief comparative view of the Irish legislative counsel's role and the position of our colleagues in the varied but comparable bilingual legal systems in effect in Wales, Canada, Hong Kong, South Africa, and Tanzania, and
4. a consideration of the potential challenges and issues yet to be faced by legislative counsel in Ireland regarding the Irish language in the future.

The Irish courts have considered a significant amount of important case law on the Irish language since the foundation of the State, particularly on the topic of the rights of the individual to conduct their affairs through Irish. Though such matters are beyond the scope of this article, it is worth mentioning that our courts have considered the ways in which the constitutional position of the Irish language confers individual rights regarding the right to a fair trial,<sup>2</sup> the responsibility of the State to provide translations of certain legislative enactments,<sup>3</sup> and the State's responsibility to make Irish language legislation available.<sup>4</sup>

The position of the Irish language in our legal system is acknowledged, both as a matter of principle<sup>5</sup> and in certain specific respects,<sup>6</sup> in the Constitution. To understand the complex but prominent role of the language in the Irish legal order, one must first understand why the Constitution gives Irish its particular legal status.

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<sup>2</sup> *An Stát (Mac Fhearraigh) v Mac Gamhnia* (1983) TÉTS 29.

<sup>3</sup> *Delap v an tAire Dlí* (1990) TÉTS 46.

<sup>4</sup> *Ó Beoláin v Breitheamh Fahy* [2001] IESC 37.

<sup>5</sup> See Article 8 of Bunreacht na hÉireann.

<sup>6</sup> See Article 25 of Bunreacht na hÉireann.

The Irish Constitution has a particular vision as regards the Irish language. At the turn of the 20th Century, the Irish language was in a state of decline and disuse amongst the majority of the population due to a number of multi-generational factors including mass emigration from Irish-speaking regions, financial pressures to master the more economically lucrative English language, and coercive efforts on the part of colonial forces to discourage the use of, and education in, the language.

The Constitution of 1937 (or *Bunreacht na hÉireann*) was adopted in the context of fundamental political and social change in Ireland. It was the first legal instrument of the modern era by which Ireland asserted a wholly autonomous legal order, and officially claimed political self-determination without reference to Westminster or the Royal prerogative.<sup>7</sup>

One of the chief architects of, and advocates for, the 1937 Constitution was President of the Executive Council (later Taoiseach and subsequently President) Eamonn DeValera. Like most of his cabinet and Fianna Fáil party members at the time, he was from a staunchly nationalist cohort of the Irish independence movement, to a far greater extent than his more moderate Cumann na nGaedheal and Fine Gael predecessors who held power in the earliest days of the Free State. DeValera himself was a fluent Irish speaker and vociferous advocate for the promotion and, in some cases, revival of Irish cultural touchstones.<sup>8</sup> Part of DeValera's vision for an independent Ireland was to revive the language's viability as the primary method of communication for the Irish people.<sup>9</sup> The drafters of the Constitution therefore envisaged, to at least some extent, a bilingual society and saw the Constitution, being the first complete and legally effective provision for an entirely independent Ireland, as an appropriate medium for setting out this vision. The importance of the Irish language was, therefore, one of the many nationalistic values – accompanied by religious and cultural ideas – embodied in the Constitution due to the fact that they were, at the time, considered to be especially important and relevant to contemporary Irish culture and society.

It is probably fair to say that the position of the Irish language in the Ireland of 2020 falls somewhat short of what the architects of the 1937 Constitution envisaged. Though the most recent census data suggest that 40% of Irish people can speak Irish to some extent, the same data suggests that just over 4% use the language on a daily basis. Despite the fact that education in Irish is compulsory in the public education system, the language is recognised as “definitely endangered” by UNESCO.<sup>10</sup>

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<sup>7</sup> The Free State Constitution of 1922 gave Ireland a degree of independent autonomy but retained references to the British Monarch.

<sup>8</sup> Tim Pat Coogan, *DeValera: Long Fellow, Long Shadow* (Head of Zeus Ltd: London, 2015) at 30.

<sup>9</sup> Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution*, (Mercier Press: Cork, 2007) at 148.

<sup>10</sup> Christopher Moseley, *Atlas of the World's Languages in Danger*, 3<sup>rd</sup> ed. (UNESCO Publishing: Paris, 2010), Online version: <http://www.unesco.org/culture/en/endangeredlanguages/atlas>.

As will be seen in the following discussion of the role of Irish in the Constitutional order, there is something of a dissonance between the position of primacy and supremacy formally afforded to the language by the Constitution and its position in daily speech and ordinary social affairs. Clearly, the failure to reinstate the Irish language as the primary means of communication amongst the majority of Irish people cannot realistically be laid at the feet of the Constitution alone, but the contrast has significant ramifications for those working with the formulation and interpretation of Irish legislation, including legislative counsel.

### **The role of Irish in the Irish Constitutional Order**

The Constitution's approach to the Irish language was one element of a young nation's attempts to declare and shape a distinct national entity. It was drafted and published in two languages, with Irish designated as the first national language and English as a second official language.

The Constitution, though an aspirational document in certain respects, gives the Irish language a strong position not just as a matter of sentiment or idealism, but also in certain substantive respects:

- Articles 8.1 and 8.2 of the Constitution designate Irish and English as the “first official language” and a “second official language” respectively.
- Article 25.5 requires that the text of the Constitution be made in both official languages, and Article 25.5.4<sup>o</sup> provides that, in the case of conflict between the English and Irish texts of the Constitution, the Irish version shall prevail.
- Article 25 assumes that a Bill may be made in either or both official languages (Article 25.4.3<sup>o</sup>), and that if a Bill is made in only one official language, an official translation of the Bill into the other official language must be issued (Article 25.4.4<sup>o</sup>).
- Article 25.4.6<sup>o</sup> provides that, in the case of conflict between the English and Irish texts of an Act, the Irish text will prevail. Crucially, this provision applies only in the case of laws which have been *made* (initiated in, and subsequently passed by, the Oireachtas<sup>11</sup> and enrolled according to the Constitution) in both English and Irish simultaneously. The same interpretive supremacy is not afforded to official translations of laws produced *ex post facto*. In this respect, the principle of democratic oversight and legitimacy is given precedence over the apotheosis of the Irish language. Official translations are prepared by civil servants in Rannóg an Aistriúcháin (the official Irish Language translation unit)<sup>12</sup> after Bills have been passed. The translated text of laws is not, therefore, scrutinised in any way by the Oireachtas. To afford interpretive supremacy to such a text, over the

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<sup>11</sup> The Irish legislature, which is bicameral and consists of an upper house (the Seanad) and a lower house (the Dáil).

<sup>12</sup> See below the discussion of the role of Rannóg an Aistriúcháin.

version that was passed by the Oireachtas, would raise serious questions of democratic legitimacy, and so the Constitution does not afford official translations this status. In practice, it is extremely rare for a Bill to be passed in Irish and translated to English. The reverse is usually the case.

The Constitution, therefore, affords Irish a very strong position in the legal system, going so far as to make it the determinative language in the case of conflicts between the English text and the Irish text (in cases where two texts of equal legal status are available). As was noted earlier, the formal supremacy of the Irish language in constitutional terms is in contrast with the limited extent to which the language is used as the means of ordinary communication. As will now be discussed, this indirectly but profoundly shapes the legislative counsel's role, such as it is, in the preparation of laws in the Irish language.

### **The (limited) linguistic role of legislative counsel in Ireland**

From the perspective of legislative counsel, one of the practical offshoots of the constitutional supremacy of Irish is that legislation is almost universally formulated in English alone.

In the overwhelming majority of cases, the policy underpinning Bills is formulated and circulated in English, Heads of Bills are produced in English, instructions based on that policy are provided to OPC by instructing officials in English, and the iterative process of seeking and clarifying instructions, as well as the actual drafting, takes place entirely through English in almost all cases. Naturally, as a result of being prepared and published in English, Bills are typically considered and debated in both houses of the Oireachtas in English, amended (if at all) in English, and ultimately passed and published in English.

The predominance of English in this context is probably attributable to a number of factors. Though it is relevant to note that there are relatively few personnel sufficiently competent in both English and Irish to provide and receive bilingual drafting instructions, not to mention a low number of elected representatives with a sufficient ability to understand both languages to properly debate and consider bilingual texts, in reality it is submitted that one of the biggest factors working against the production of Irish language legislation is market-based. Given that virtually everyone in Ireland understands and speaks English, and given that there are very few who speak Irish alone and cannot understand English, there is a comparative lack of demand for resources and services to be made available in Irish. Elected representatives making remarks in the Oireachtas in Irish cut down their audience by more than half (according to census data), and essentially rule out detailed coverage and analysis by all but one national broadcaster.<sup>13</sup>

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<sup>13</sup> TG4, the Irish language television station, was established in 1996 to make available Irish language news and entertainment content.

In truth, the competence of officials to formulate, instruct on, draft, and pass bilingual legislation from source is at present largely untested. The lack of legislation prepared in Irish at source is, it is submitted, attributable in the main to a lack of political imperative to produce Irish language legislation.

Furthermore, it will be recalled that, in relation to legislation initiated and passed in both English and Irish, the Irish text prevails in the event of conflict between the two versions. The same supremacy is not relevant in the case of a Bill passed in one language only and subsequently translated. This means that the stakes are, relatively speaking, quite high when it comes to the preparation of bilingual legislation. The Irish version of the text must be assiduously parsed and reviewed in order to ensure that it properly reflects the intention of the sponsoring department and the Oireachtas. The Irish text cannot be prepared simply as a direct translation of the English text in such cases, as it will be treated as authoritative in cases of conflict. This presents certain risks if the instructions on which legislation is based are provided in English, and if the English text is the primary focus of legislators during its passage through the Oireachtas. The chances of the Irish text taking precedence in a way which does not fully reflect the legislative intent may be somewhat heightened.

It may be the case that, in light of these risks, it is seen as legally safer to draft legislation in one language and have it translated, after enactment, into the other (thereby making the former the authoritative text and the latter an official interpretive document, representing an official version of the law in question, and which can be relied upon in court, but which does not “trump” the text that was passed by the Oireachtas). It should be noted that there is no textual authority or evidence for this interpretation; it merely represents one possible reading of the factual position.

The risks in this respect might be well illustrated by reference to a hypothetical example, drawing on the experience of our Canadian colleagues. In the case of *Cardinal v The Queen*,<sup>14</sup> the Court considered certain requirements for the surrender of land under the *Indian Act* 1906. The English language version of the relevant provision stated that surrender of certain lands had to be certified by “some of” the relevant chiefs or elders, whereas the French version stated that the certification had to be made by “*l’un des chefs ou des anciens*” (translating to “one of the chiefs or the elders”). Because of the fact that “some of” is an inherently ambiguous and unhelpful way to describe the number of people required to do something, the court referred to the clearer meaning of the French text, which provided a sufficiently unambiguous means of counting the chiefs or elders in question. The Court in that case was at liberty to prefer the interpretation of the text in the language providing the clearer solution to issue at hand, as the French and English versions of Canadian federal statutes have *equal* authority (as is discussed in greater detail below). The Court was therefore at large to synthesise an interpretation based on the mutual interaction of both

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<sup>14</sup> [1980] 1 FC 149, (1980), 97 DLR (3d) 402.

texts, and to prefer one text over the other where it was impossible to achieve a harmonious or sensible synthesis.

While Canadian courts have made many decisions more authoritative than *Cardinal* on the question of bilingual interpretation,<sup>15</sup> the case illustrates a very significant divergence between the position in Ireland and the position in Canada. On the plainest available reading of the Irish Constitution, the above approach would not be available to a judge dealing with a similar ambiguity between the Irish and English texts of a law. The Constitution is quite clear in stating that, where there is a conflict between the Irish text and the English text, the former shall prevail. It does not make any exceptions for cases in which the “conflict” in question arises due to the Irish text being unhelpful, ambiguous, or even mistaken.

To the very limited extent that this question has been litigated in Ireland, the Superior Courts have typically dealt with this conundrum by reading the Irish and English texts together in a harmonious way that relies upon their shared meaning, thereby concluding that there is no “conflict” between the texts in the first place, which in turn avoids having to place complete reliance on the Irish text alone.<sup>16</sup>

All this means that OPC’s role in relation to the drafting of the vast majority of legislative provisions is unilingual. At a general level, it is a role with which CALC members will, of course, be very familiar. In essence, it typically consists of reviewing legislative proposals, usually in the form of a draft enactment, provided by a government department or (on occasion) a private member. An iterative process then begins, in which the policy intent behind the proposal is elucidated, various legal issues (if any) are discussed, and a series of further drafts are provided before the text is agreed between OPC and the sponsoring department. In the enormous majority of cases, this is done entirely unilingually (in English). As will be discussed below, in taking a comparative look at the role of legislative counsel in bilingual legal systems, this is a relatively unusual approach.

While OPC typically deals only with the English text of legislation, there are two partial exceptions to this:

- a) Bills to amend the Constitution, which are always drafted by OPC and which (by virtue of the bilingual character of the Constitution) necessarily involve the inclusion of Irish and English texts. In such cases, the English version of the Bill is drafted by OPC first, and the relevant provision relating to the Irish text to be amended is subsequently provided by Rannóg an Aistriúcháin for insertion into the Bill, and
- b) Enactments that are to be *made* bilingually (rather than translated after enactment), an approach which has been adopted most often in relation to Bills with a particular

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<sup>15</sup> *R. v Daoust* [2004] 1 SCR 217, *Chrysler Canada Ltd. v Canada* [1992] 2 SCR 394 *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 S.C.R. 1016.

<sup>16</sup> *Sinnott v Minister for Education* (2001) IESC 148, *Roche v Roche* (2009) IESC 82, *McGee v Attorney General* (1973) IESC 2, *O’Donovan v Attorney General* (1961) 1 IR 114.

significance to the Irish language, such as the Official Languages Act 2003, which was produced and enacted bilingually. In such cases, the English and Irish texts are produced via a collaborative process between OPC and Rannóg an Aistriúcháin, with advisory input on the potential interpretive issues arising from the two texts.

### **The role of the translation unit**

The role of OPC in preparing primary legislation comes to an end once the Bill is enacted and signed into law by the President. After that, the unilingual version of the law, as enacted, is to be officially translated. Official translations are prepared by Rannóg an Aistriúcháin (the official Irish Language translation unit), which has been translating legislative provisions on an official basis since the 1930s, and has a wide variety of other responsibilities including providing simultaneous interpretation between English and Irish language contributions in the Oireachtas, translating a variety of official (but non-statutory) documents and state communications, and the production and review of *An Caighdeán Oifigiúil* (the official standardised rules of the Irish language, which regularises the highly diverse and dialect-based language for use in formal and official contexts).

Possibly due in part to these many and varied demands on its time and resources, the official translations of Acts prepared by Rannóg an Aistriúcháin are not being produced at quite the same rate as the overall legislative output of the Oireachtas. This has led to quite a significant backlog in the availability of official Irish language translations of Acts, despite legislative provision being made specifying certain obligations regarding the printing and publication of Bills.<sup>17</sup>

In practice, the roles of OPC and Rannóg an Aistriúcháin in the legislative process are largely distinct. Save in the exceptional cases mentioned previously, OPC alone deals with the entirety of the drafting process for most primary and secondary legislation, and does so in one language. OPC's role in the legislative process concludes upon the making of the statutory instrument or the enactment of the Act in question, at which point no changes – structural, substantive, or otherwise – are possible. It is only after that point that the role of Rannóg an Aistriúcháin in the translation process begins. Thus, there is rarely a dialogic or consultative process between OPC and Rannóg an Aistriúcháin as regards legislation. Rannóg typically deals with the “finished product”, so to speak, when translating legislation into Irish. As will be discussed below, there are benefits and disbenefits to this separation between the role of OPC and Rannóg an Aistriúcháin.

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<sup>17</sup> There is an obligation under s. 7 of the *Official Languages Act 2003* to print and publish legislation “as soon as may be after enactment”.

### **A comparative analysis with the role of legislative counsel in other multilingual jurisdictions**

As will be seen from the following comparative overview of a selection of other jurisdictions with bilingual legal systems, the position of Irish in our legislative drafting system is unique in two important and countervailing ways:

- a) it is afforded a position of exceptional linguistic strength to a greater extent than any of the jurisdictions to be considered, and
- b) there is a greater habitual separation between the processes of producing the English and Irish texts than is evident in any of the jurisdictions to be considered.

At the Federal level in Canada, legislation is required to be produced in English and French<sup>18</sup> and both English and French texts are afforded equal status.<sup>19</sup> Laws are drafted using a process known as “co-drafting” whereby two legislative counsel are instructed simultaneously. One is responsible for preparing the English text and one is responsible for the French, and each has a high degree of literacy and understanding of the both languages. Though drafting instructions are typically provided monolingually, background and preparatory materials in both languages are provided at the instruction stage.<sup>20</sup> The two legislative counsel continuously consult and compare their drafts as they are progressed, allowing them to work out linguistic knots and other issues on a mutually agreeable basis that works in both languages. As both legislative counsel have access to the same instructions and have equal responsibility for equally authoritative texts, neither is relying solely on the work of the other to attempt to ascertain the intended policy effect of their respective text. A positive offshoot of this collaborative-by-design approach is that both legislative counsel identify translation problems at source, so that phrases, structures, or concepts that are difficult to express in one language can be altered to allow for a more accurate reflection in the other, which leads to fewer inconsistencies or inelegant translations. This approach also has the ancillary but important benefit of meaning that English and French texts of laws are produced at the same rate.

There are differing approach to preparing bilingual legislation in the various Canadian jurisdictions. In Ontario, New Brunswick, and Quebec, for example, an ex-post-facto translation approach is adopted rather than the co-drafting method espoused at Federal level and in the Province of New Brunswick.<sup>21</sup> In Ontario, the translator has access to dialogue

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<sup>18</sup> *Constitution Act, 1867* s. 133 and *Canadian Charter of Rights and Freedoms*, ss. 17 and 18. The Supreme Court has interpreted s. 133 to require enactment in both official languages and entail equal authenticity of both versions: see *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 S.C.R. 1016.

<sup>19</sup> *Constitution Act, 1867* s. 133 and *Canadian Charter of Rights and Freedoms*, ss.16(1).

<sup>20</sup> Donald L. Revell, “Authoring Bilingual Laws: The Importance of Progress” (2004), 29 *Brook. J. Int'l L.* 1085.

<sup>21</sup> D. L. Revell, “Bilingual Legislation: The Ontario Experience” (1998), 19 *Stat LR* 32.

with the original instructing official, whereas in Quebec the translator works directly with the person who drafted the original provision.

In Hong Kong, by virtue of the *Official Languages Ordinance*,<sup>22</sup> both English and Chinese texts of laws have equal authority.<sup>23</sup> Legislation is prepared by a collaborative translation-based process that involves the primary receipt of instructions and drafting being carried out in English by a legislative counsel. Once a draft of the relevant provision is at an advanced stage, but critically before it is finalised and enacted, a Chinese translator reviews the English text with a view to preparing the official translation into Chinese. This provides the translator with an opportunity to engage in a dialogue with the original legislative counsel in order to point out any expressions or structures that will be difficult or impossible to translate faithfully into Chinese. The legislative counsel then has the opportunity to revise their text. This might be termed a “translation-friendly drafting” approach.

Hong Kong has also engaged in a process of retrospectively translating laws from English into Chinese. Legislative counsel writing on the issue have noted that the process of translating from the highly-idiomatic and legalistic English texts of pre-1997 legislation into Chinese is a significantly more difficult task than translating modern texts, which have the benefit of the collaborative approach described in brief above.<sup>24</sup>

The phenomenon of translation-friendly drafting is particularly useful for translations between languages without a common linguistic heritage, where one is more likely to encounter moods, syntax, and manners of expression which are vital to one language but alien to the other. Without paying attention to the ways in which a perfectly normal expression in one language might result in translation conundrums in the other, it is possible that legislative counsel in bilingual systems could inadvertently give rise to ambiguities or inconsistencies between the two language versions.

In Wales, certain legislative provisions are made in both English and Welsh, and once made both texts of a law have equal authority.<sup>25</sup> Unlike many Canadian jurisdictions, there is no requirement that all laws be made bilingually, but those that are so made are prepared in both languages before being passed. The Welsh text of laws is prepared by the Legislative Translation Service, which is staffed both by interpreters and jurilinguists and typically works by preparing a Welsh text after the English version has been drafted. A unique way in which conflicts between the Welsh and English texts of laws are mediated is that Welsh Ministers are empowered to specify by Order that a particular Welsh word or phrase has the same meaning as the English word or phrase.<sup>26</sup>

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<sup>22</sup> Section 3, *Official Languages Ordinance*, Cap. 5.

<sup>23</sup> *Ibid*, section 3(2).

<sup>24</sup> Yen, ‘Bi-lingual Drafting in Hong Kong’ (August 2010) *The Loophole* 65.

<sup>25</sup> Section 156(1), *Government of Wales Act 2006*, c. 32 (UK).

<sup>26</sup> *Ibid*, section 156(2).

The approach to preparing bilingual legislation in South Africa and Tanzania is (broadly speaking) quite similar to that adopted in Ireland. In South Africa, the eleven official languages are recognised in the Constitution and the State is required to protect them, particularly with regard to “minority” languages. In an approach similar to that at play in Ireland, the Translation Unit of the Office of the Chief State Law Adviser prepares translations in the various languages after the legislation has been enacted (which is almost always done in English), but only the version of the Bill that is originally signed into law is considered an authoritative version.

In Tanzania, translations of laws (which are usually presented in Parliament in English, sometimes in Kiswahili, but only ever in one language) are prepared by the Attorney General on a selective *ex-post-facto* basis. Bills are usually debated in Parliament in Kiswahili despite the fact that the Bills are ultimately published in English. This is done without a specific constitutional imperative, and the translations do not have the status of authoritative texts.

This paper aims to be comparative and descriptive rather than normative. It is not proposed to sit in judgment of the various approaches described, or indeed to claim in light of this brief comparative overview that the Irish approach necessarily should be changed. Having said that, benefits can be identified in relation to each approach.

- The Canadian co-drafting approach allows for the two texts to be complementary and coterminous from the outset. In theory, in relation to bilingual legislation, there are two texts but those two texts should express only one law. Any other approach would give rise to impossibilities of application and interpretation. Because the co-drafting method allows the texts to influence and shape each other at source, with equal access to policy instructions and with both texts forming an equally critical part of the legislative output, it presents a good opportunity for the two texts to mutually benefit one another. Ambiguities can be identified at source and provided for, linguistically incompatible modes of expression can be altered, and faithfulness to the legislative intent can be ensured in both languages.
- The “translation-friendly drafting” approach adopted in Hong Kong has been described as providing a fruitful basis for the mutual improvement of bilingual texts.<sup>27</sup> This approach can allow one text to be altered where it would present serious translation difficulties in the other, and also stands to allow for the active contribution to one language of innovative terminology and expressions. Yen has noted that Chinese terms have been adopted, adapted, and created in order to accommodate certain legal concepts commonly expressed in English, which has

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<sup>27</sup> Yen, above n. 26.

led to an enriching of the Chinese vocabulary in Hong Kong as regards linguistic matters.<sup>28</sup>

- The *ex post facto* translation approach evidenced (in varying ways) in South Africa, Tanzania, and Ireland casts the role of the legislative counsel and the translator as functionally separate. There are advantages and disadvantages to this approach. It can be argued that drafting in one primary language allows the legislative counsel to focus, with the greatest available level of precision, on the ways in which their words give effect to the policy instructions in question, and the extent to which their draft reflects the policy considerations underpinning the legislation in question. To paraphrase Paul Salembier,<sup>29</sup> a person with just one watch always knows the time, but a person with two watches can never quite be sure. Conversely, this approach isolates the legislative counsel in a bilingual system, to some extent, from the ways in which their drafts can be interpreted and applied downstream. This approach therefore represents a drafting system that is monolingual in a legal system that is bilingual. This approach has the ancillary (though not insignificant in the modern era of significant demands being placed on the legislative counsels' time) benefit of being the most likely method to produce completed legislation from instruction to enactment in the shortest period of time, albeit monolingually.

One constant function of the legislative counsel, regardless of the legal system in which they work, is to attempt to predict, as best they can, how their work will be interpreted in future. In the context of bilingual legal systems, this function is in effect doubled, as there will be (at least) two available reference points by which to interpret laws. The systems described above cast legislative counsel in a variety of different roles, each with their own varying perspectives on the best connection between drafting and translation. The most appropriate approach probably depends greatly on the context of the legal system in question, and the practical realities of general resources and the demand and political imperative for bilingual legislation.

### **Opportunities and challenges for Irish legislative counsels in future**

One of the most important and interesting developments around the Irish language in the legislative process comes from the law of the European Union.

Irish was officially recognised as an official language of the EU in 2005,<sup>30</sup> but is currently subject to a derogation<sup>31</sup> from the full translation responsibilities that flow from that

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<sup>28</sup> Ibid.

<sup>29</sup> Paul Salembier, "Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule" (2003), 35 *Ottawa Law Review* 75.

<sup>30</sup> Council Regulation (EC) No 920/2005 of 13 June 2005.

<sup>31</sup> Council Regulation (EU, Euratom) 2015/2264 of 3 December 2015.

designation. This derogation will be lifted in January 2022, which will mean that all EU legislation, all CJEU decisions, and various other EU official instruments will need to be translated and published in Irish as well as all of the other official languages of the EU.

Once the derogation is lifted in 2022 there will be an unprecedented influx of Irish language legislation, via the EU, operative in Ireland. The Irish texts of EU laws will be prepared at EU level (through a co-drafting process) by specialised translation and lawyer-linguist teams, with legal training and expertise in Irish, English, and a third EU official language, but obviously without the input of OPC.

This will presumably have the benefit of enriching the inventory of legal and technical terms in use in the Irish language, thus broadening the language's reach and vocabulary, but it could pose new challenges from an implementation perspective.

Certain EU legislative provisions, known as Regulations, automatically form part of Irish law without further action being taken domestically. The Irish translations of such provisions will, therefore, form part of domestic law automatically. Questions will arise as to the proper relationship between these Irish texts and their English counterparts. The latter have previously been the basis on which most EU law is proved and litigated in the Irish legal system. The widespread introduction of a greater number of Irish texts, with possible accompanying divergences in emphasis and interpretation, will be a matter for the Irish legal community as a whole to reckon with.

Further, OPC commonly works with EU legislative instruments known as Directives, which set out the general aims and purposes to be complied with by the various EU member states, but gives those states discretion as to the ways in which they give effect to those aims. OPC is frequently called upon to draft domestic legislation which respects the requirements of Directives and accurately implements the required legal outcomes through the appropriate processes. As the Irish language derogation at EU level is lifted, greater opportunities will arise for OPC to consider and work with the Irish language texts of Directives in the course of implementing EU law in Ireland.

Of course, as a matter of EU law the texts of various legislative provisions in all languages are of equal value and are equally authoritative,<sup>32</sup> so in a sense there is (from a European point of view) no greater or lesser imperative on Ireland to draft or to act in accordance with the Irish translation of EU laws than there is to draft or act in accordance with the Swedish or Portuguese version. From a constitutional perspective, however, and in light of Supreme

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<sup>32</sup> Regulation 1/1958/EC. The question of how to address interpretive divergence between the various texts is complex and not authoritatively settled. The CJEU is the ultimate arbiter of the meaning of EU law and will consider the shared meaning of different versions where a legal question turns on it, but in *Srl CILFIT v Ministero della sanità (C-77/83)*, the CJEU indicated that the question of divergent language was one that should be addressed in the first instance by the referring Member State. For more on this very complex and interesting aspect of EU law, see Irene Otero Fernández, *Multilingualism and the meaning of EU law* (European University Institute: Florence, 2020).

Court decisions such as *O’Beolain v Fahey*<sup>33</sup> and *An Stát (Mac Fhearraigh) v Mac Gamhnia*,<sup>34</sup> which attribute actionable rights to individuals on the basis of the constitutional protection of the Irish language, there may well be an enhanced onus on the legislative process in Ireland, and particularly on legislative counsel, to take stock of the Irish versions of EU laws when implementing EU Directives.

It is conceivable that the number of potential avenues for challenge on the basis of EU law being improperly implemented or applied in Ireland could increase along with the greater availability of Irish language reference texts by which to assess Irish implementing measures. Even if no greater substantive weight is placed on the Irish text of EU legislation than on the text in any of the other official languages, the simple fact of there being a legal system that is equipped to assess and analyse the Irish texts (to an extent that is not possible in Ireland as regards, say, the Maltese or Danish texts) could increase the chance of such challenges taking place, and so legislative counsel here will do well to be live to it.

## **Conclusion**

The role of the legislative counsel in the preparation of bilingual legislation in Ireland is limited. Using the “translation model” discussed above, legislative counsel work exclusively in English. This approach has been used since the foundation of the State, and there appears to be no reason to believe that it will (or indeed necessarily should) be changed in the near future. Exciting new opportunities are on the horizon for the extent to which Irish texts, particularly at EU level, might influence the Irish legislative counsel’s task.

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<sup>33</sup> Above n. 4.

<sup>34</sup> Above n. 2.

## Should the National Assembly of The Gambia oversee subsidiary legislation? A critique of Standing Order 80

Abubakarr Siddique Kabbah<sup>1</sup>



### Abstract

*This article addresses the issue of whether subsidiary legislation should be subject to parliamentary oversight through a procedure adopted by the National Assembly of The Gambia under Order 80 of the latest edition of its Standing Orders. The procedure involves the publication in the Gazette for a specified time and laying before the Assembly of subsidiary legislation. The main thrust of the article is that National Assembly scrutiny of subsidiary legislation is a worthy initiative, albeit one that could be fraught with problems. The most obvious impediment is that the procedure established by the Standing Orders conflicts with the procedure prescribed by the Interpretation Act. This raises the question of whether Standing Orders can abrogate or override primary legislation. The article examines how certain jurisdictions based on the Westminster parliamentary system have established a general obligation to lay subsidiary legislation before their Parliaments and posits that the challenges of implementing Order 80 are surmountable through respecting the hierarchy of laws and recognising the importance of parliamentary development.*

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## Introduction

The *Constitution of the Republic of The Gambia* provides for legislative power of The Gambia to be exercised by Bills passed by the National Assembly with the assent of the President.<sup>2</sup> It also recognises that the National Assembly may delegate an aspect of its law-making power to individuals or bodies through enabling Acts.<sup>3</sup>

There are myriad reasons why it may be necessary for Parliament to delegate legislative power. Bennion has summarised them as follows:

- (a) Modern legislation requires far more detail than Parliament itself has time or inclination for. For example, detailed forms may be needed.
- (b) To bring a complex legislative scheme into full working operation, consultation with affected interests is required. This can best be done after Parliament has passed the outline legislation, since it is then known that the new law is indeed to take effect and what its main features are.
- (c) Some details of the overall legislative scheme may need to be tentative or experimental. Delegated legislation affords an easy means of adjusting the scheme without the need for further recourse to Parliament.
- (d) Within the field of a regulatory Act new developments will from time to time arise. By the use of delegated legislation the scheme can be easily altered to allow for these.

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<sup>2</sup> *Constitution of the Republic of The Gambia 1997* [Reprinted 2009], s 100(1).

<sup>3</sup> *ibid*, s 101(8).

(e) If a sudden emergency arises it may be essential to give the executive wide and flexible legislative powers to deal with it whether or not Parliament is sitting.<sup>4</sup>

The *Interpretation Act* of The Gambia uses the term “subsidiary legislation” for a form of legislation that any person or body other than the National Assembly makes pursuant to a power conferred by an Act.<sup>5</sup> “Subsidiary legislation” refers to any instrument made under an enabling statute or any other lawful authority, and having the force of law.<sup>6</sup> This may take the form of a Proclamation, a rule, a regulation, an Order, a notice, a by-law or other instrument.<sup>7</sup>

As a general rule subsidiary legislation forms part of, and must be read together with, its enabling Act; its “essential function... is to carry out the purpose of the enabling Act”.<sup>8</sup> Therefore, it must not be inconsistent with that Act.<sup>9</sup>

### **Nature and scope of Standing Orders generally**

The National Assembly approved the 2019 Revised Edition of its Standing Orders during the Third Ordinary Session in the 2019 Legislative Year, while revoking the 2001 Edition.<sup>10</sup> This was done by virtue of the power conferred upon the Assembly by the Constitution to “regulate its own procedure and, in particular, [to] make Standing Orders for the conduct of its own proceedings”.<sup>11</sup>

Standing Orders have been described in the UK as ‘the written rules which regulate the proceedings of each House’,<sup>12</sup> in New Zealand as ‘the rules that govern how the House operates’,<sup>13</sup> and more comprehensively in Canada as:

The permanent written rules under which the House regulates its proceedings... The continuing or “standing” nature of rules means that they do not lapse at the end of a

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<sup>4</sup> F A R Bennion, *Bennion on Statutory Interpretation*, 5th ed. (Lexis Nexis, UK, 2008) section 50, 242-243. See also Professor Dr Helen Xanthaki, *Thornton’s Legislative Drafting*, 5th ed. (Bloomsbury Professional, West Sussex, 2013) para 15.2 at 403-404 on “circumstances [that] make delegated legislation on matters of substance both legitimate and desirable”.

<sup>5</sup> *Interpretation Act*, Chapter 4:01, Volume 1 of the Laws of The Gambia 2009, Revised Edition, s 3.

<sup>6</sup> Since the *Interpretation Act* uses the term ‘subsidiary legislation’, I will use it throughout this article instead of the terms ‘delegated legislation’, ‘subordinate legislation’ or ‘secondary legislation’.

<sup>7</sup> See Xanthaki, above n. 4, para 15.30 at 416 and Bennion, above n. 4, sections 62-66 at 266-271 for a thorough appraisal of the forms or types of subsidiary legislation.

<sup>8</sup> See Bennion, *ibid.*, section 50 at 243.

<sup>9</sup> See *Interpretation Act*, above n. 6, s 11(c).

<sup>10</sup> In accordance with Standing Order 146(1), the Standing Orders came into operation at the commencement of the Fourth Ordinary Session of the Fifth Assembly in the 2019 Legislative Year upon publication in the *Gazette*.

<sup>11</sup> Above n. 2, s 108(1).

<sup>12</sup> Standing Orders, UK Parliament, [Glossary](#), accessed 27 March 2020.

<sup>13</sup> [Standing Orders](#) – New Zealand Parliament, accessed 27 March 2020.

session or parliament. Rather, they remain in effect until the House itself decides to suspend, change or repeal them... each of [the Standing Orders] constitutes a continuing order of the House for the governance and regulation of its proceedings. The detailed description of the legislative process, the role of the Speaker, the nature of the parliamentary calendar and the rules governing the work of committees and private Members' business are some of the topics covered in the Standing Orders. The House declares these continuing orders to be Standing Orders when it formally adopts them, and it periodically issues them as a publication for the guidance and use of all Members.<sup>14</sup>

From these descriptions of Standing Orders, it is generally understood that they regulate how Parliament should function or carry out its official business. Standing Orders are procedural guides for the Members of Parliament. They are reviewed by those Members periodically and then amended from time to time. Generally, they do not have the force of law.

### **Parliamentary procedure and practice before Order 80**

The revoked 2001 Edition of the Standing Orders of the National Assembly neither provided for National Assembly scrutiny of subsidiary legislation nor did the Assembly scrutinise subsidiary legislation as part of its remit.

### **Parliamentary procedure established under Standing Order 80**

The 2019 Revised Edition of the Standing Orders of the National Assembly includes Order 80(1), which establishes a procedural framework for the legislative oversight of subsidiary legislation in The Gambia. Standing Order 80(1) provides –

Any subsidiary legislation made by a person, ministry or authority under a power conferred by the Constitution or any other law –

- (a) shall be published in the Gazette by the regulation-making authority at least 14 days before it is laid;<sup>15</sup>
- (b) shall be laid before the Assembly, accompanied by an explanatory memorandum setting out in detail the policy and principles of the subsidiary legislation, the defects of which it is intended to remedy and the necessity for its introduction;<sup>16</sup>

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<sup>14</sup> See [Parliamentary Procedure – The Standing Orders](#) in *House of Commons Procedure and Practice*, 3<sup>rd</sup> ed., M. Bosc & A. Gagnon, ed. (House of Commons (Canada): Ottawa, 2017), accessed 27 March 2020.

<sup>15</sup> According to Xanthaki, above n. 4, para 15.21, 412, the purpose of publication in the Gazette is to bring subsidiary legislation up to the attention of parliament and affected persons.

<sup>16</sup> According to Xanthaki, *ibid.*, para 15.23 at 413, “A general obligation to lay delegated legislation before the legislature..., at least in theory ... directs ... the attention of members of the legislature to the legislation and providing a means to its disallowance.” Standing Order 35 describes laying a piece of subsidiary legislation before the National Assembly in terms of delivering it to the Clerk of the Assembly “on any day that the Clerk’s Office is open and the Assembly is not dissolved” following which the Clerk shall cause it to be listed “in the Record of Votes and Proceedings [of the Assembly]”.

- (c) shall be placed on the list of laid papers on the day when it is so laid, and stand committed to the Subsidiary Legislation Committee.<sup>17</sup>

Under this procedure subsidiary legislation shall have the force of law after it has been laid before and approved by the Assembly. But approval is not automatic; subsidiary legislation is subject to the power of the Assembly to annul it in whole or in part, as the case may be.<sup>18</sup>

### **Terms of reference for scrutiny of subsidiary legislation**

According to the Zimbabwe Legal Information Institute,

Although it is now accepted that in the modern State delegated legislation cannot be avoided, there is nonetheless concern that the exercise of delegated legislative powers be properly controlled to ensure that they are not abused to the detriment of the citizens.<sup>19</sup>

The National Assembly is seeking to retain a measure of control over the exercise of delegated legislative power through scrutiny of subsidiary legislation, which could enable the Assembly to ascertain whether subsidiary legislation is made within the ambit of enabling Acts.<sup>20</sup> Standing Order 80(2) provides a range of matters for scrutiny by the Subsidiary Legislation Committee of the National Assembly:

After subsidiary legislation is referred to the Committee, it shall in particular, consider:

- (a) whether it is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written law;
- (b) whether it infringes on fundamental rights and freedoms of the public;
- (c) whether it contains any matter which in the opinion of the Committee should more properly be dealt with in an Act of the National Assembly;
- (d) whether it contains the imposition of any tax;
- (e) whether it directly or indirectly bars the jurisdiction of the courts;
- (f) whether it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not give any such power;

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<sup>17</sup> The Committee established under Standing Order 110 must “scrutinise, advise and report on all subsidiary legislations, laid before the Assembly”.

<sup>18</sup> See Order 80 (3), (4), and (5).

<sup>19</sup> Zimbabwe Legal Information Institute, *A guide to Administrative and Local Government Law in Zimbabwe*, “[Delegated or Subsidiary Legislation](#)”, accessed 27 March 2020.

<sup>20</sup> According to Shucheng Wang, “Parliamentary Scrutiny over Subsidiary Legislation under an Executive-led Government in Hong Kong” (2015), [36 Statute Law Review 111](#) at 120:

Although Parliamentary scrutiny broadly takes two main forms: scrutiny over legality and scrutiny over policy, it does not generally examine statutory instruments on the merits of policy.

- (g) whether it involves expenditure from the Consolidated Revenue Fund or other public revenues;
- (h) whether it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;
- (i) whether there appears to have been unjustifiable delay in its publication or in laying it before the Assembly;
- (j) whether it is defective in its drafting or, for any reason its form or purport calls for any elucidation;
- (k) whether it makes rights, liberties or obligations unduly dependent on non-reviewable decisions;
- (l) whether it makes rights, liberties or obligations unduly dependent on insufficiently defined administrative powers;
- (m) whether it inappropriately delegates legislative powers;
- (n) whether it imposes a fine, imprisonment or other penalty without expressed authority having been provided for in the enabling legislation;
- (o) whether it appears for any reason to infringe on the rule of law;
- (p) whether it inadequately subjects the exercise of legislative power to parliamentary scrutiny; and
- (q) whether it accords to any other reason that the Committee considers to examine.

The Committee, which as of March 2020 has been established with nine members, thus has a gamut of matters to be taken into account in the performance of its scrutiny function. It is hoped that it will carry out its mandate “in the best traditions of totally non-partisan, non-political technical scrutiny of legislation”<sup>21</sup> and will not delve too deeply “into the substance of day-to-day administration [since this] defeats many of the underlying reasons for delegating powers to make laws in the first place.”<sup>22</sup>

It is also hoped that the Committee will be vibrant, focused on the essentials, and responsive to the needs of both the Government and the governed.

### **Conflict in the hierarchy of parliamentary procedure**

It is recognised that:

Respect for the hierarchy of laws is fundamental to the rule of law, as it dictates how the different levels of law will apply in practice. In general, the fundamental levels of

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<sup>21</sup> Legislative Assembly for the Australian Capital Territory, Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), [Scrutiny Report 40](#), 24 March 2020, “Role of the Committee”, accessed 27 March 2020.

<sup>22</sup> “Delegated legislation – Introduction” in Bosc & Gagnon, above n. 14.

hierarchy consist of a constitution or founding document; statutes or legislation; regulations; and procedures.<sup>23</sup>

Section 7 of the *Constitution* describes the laws of The Gambia as follows:

7. In addition to the Constitution, the laws of The Gambia consist of –
- (a) Acts of the National Assembly made under this Constitution and subsidiary legislation made under such Acts;
  - (b) any Orders, Rules, Regulations or other subsidiary legislation made by a person or authority under a power conferred by this Constitution or any other law;<sup>24</sup>
  - (c) the existing laws, including all Decrees passed by the Armed Forces Provisional Ruling Council;<sup>25</sup>
  - (d) the common law and principles of equity;
  - (e) customary law so far as concerns members of the communities to which it applies;
  - (f) the Sharia as regards matters of marriage, divorce and inheritance among members of the communities to which it applies.

The hierarchy of laws dictates that the *Constitution* prevails over all other laws of the State and section 4 of the *Constitution* recognises this supremacy as follows:

This Constitution is the supreme law of The Gambia and any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void.

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<sup>23</sup> M Clegg, et al., [The Hierarchy of Laws: Understanding and Implementing the Legal Frameworks that Govern Elections](#) (International Foundation for Electoral Systems: Arlington, 2016) at 1, accessed 27 March 2020.

<sup>24</sup> Examples of these are *the Banjul Cadi Court and Kanifing Cadi Court (Establishment) Orders* (Legal Notices Nos.1 and 2 of 1999), which are made by the Chief Justice under s 137(1) of the *Constitution*; and the *Practice Direction (Establishment of a Special Criminal Division)* (Legal Notice No.3 of 1999), which is made by the Chief Justice under s 143(1) of the *Constitution*. But it is unclear what distinction (if any) exists between subsidiary legislation “made under primary legislation” – s.7 (a) and subsidiary legislation “made under a power conferred by any other law”- s.7 (b).

<sup>25</sup> According to s 230(1) of the *Constitution*, “existing laws”

means the laws in force in The Gambia immediately before the coming into force of this *Constitution*, other than any such laws which are repealed or abrogated on, or immediately before, the coming into force of this Constitution.

The existing laws therefore include Acts of the National Assembly, subsidiary legislation and Decrees passed by the former military junta. The military junta had exercised both executive and legislative power and their Decrees were later recognised by the *Constitution* and deemed to be primary legislation on a par with Acts of the National Assembly by virtue of para.6 (3) (a) of the Second schedule of the *Constitution*, which provides that

a reference to the exercise of a legislative function ...by the Government or the Armed Forces Provisional Ruling Council shall, after the coming into force of this Constitution, be read as a reference to the exercise of that function by an Act of the National Assembly.

Subsidiary legislation is ordinarily made under powers conferred by primary legislation. It is therefore trite law that primary legislation prevails over subsidiary legislation.

In my view, there is a conflict between Standing Order 80 and section 11(d) of the *Interpretation Act* as well as with every Act that delegates power to make subsidiary legislation. Furthermore, I am of the view that the *Interpretation Act* and the delegating Acts prevail because they are primary legislation and the Standing Order is, at best, subsidiary legislation.

Section 11(d) of the *Interpretation Act*, which is primary legislation, provides:

subsidiary legislation shall be published in the *Gazette* and shall have the force of law upon the publication thereof or from the date named therein:

Provided that a Proclamation may be published in such manner as the authority making it shall direct and upon publication, the Proclamation shall forthwith have the force of law unless the Proclamation otherwise provides.

The basic statutory requirement therefore is for subsidiary legislation to have legislative effect after it has been authenticated by being published in The Gambia Government *Gazette*. On the contrary, Standing Order 80 requires subsidiary legislation to have legislative effect after it has been laid before, and approved by, the National Assembly.

Despite having been made under a power conferred on the National Assembly by section 108 of the *Constitution*, it is doubtful whether the Standing Orders are a piece of subsidiary legislation.<sup>26</sup> But even if they are, the Standing Orders must not conflict with primary legislation. Yet Parliament is presumed to know the existing state of the law, especially in view of the fact that it repeals obsolete laws and enacts both original and amending Bills. What is more, Parliament is bound by the laws it passes so long as they are in force and should give effect to them.

Therefore, key questions arise from the inconsistency between section 11(d) of the *Interpretation Act* and Standing Order 80: Is Standing Order 80 valid? Can the Standing Orders repeal or supersede primary legislation in case of a conflict?

In my view, Standing Order 80 is not valid for two main reasons. First, it breaches section 11(d) of the *Interpretation Act* which is in force and to which the National Assembly is

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<sup>26</sup> It is noteworthy that the Standing Orders are not drafted in the customary format for subsidiary legislation and have been announced as General Notice No.121/2019 in *Gazette* No.35 dated 28<sup>th</sup> October 2019 (ISSN. 0796-0201) rather than as a Legal Notice. Legal Notice in this context denotes a Notice issued pursuant to a specific legislative direction, which is given a unique, identifying Legal Notice number by the Government Printer linked to the year of its publication in the *Gazette*. In contrast, General Notice signifies a Notice issued generally for information purposes that is not necessarily based on a specific legislative direction. Assuming they are a piece of subsidiary legislation, the Standing Orders would have the same status of the Rules of the High Court, which were made under s 72 of the repealed *Supreme Court Ordinance* (Chapter 5 Volume 1 of the Laws of The Gambia 1995 Edition) and are deemed to be made under s 5 of the *Courts Act* (Chapter 6:01 Volume 1 of the Laws of The Gambia 2009 Revised Edition).

obviously bound. It does so by establishing a procedure for subsidiary legislation to have legislative effect that is clearly at variance with the procedure prescribed by section 11(d) and is therefore invalid to the extent of its inconsistency with section 11(d). Second, it amounts to an implied repeal of section 11(d) of the *Interpretation Act*, which clearly goes against the grain of the National Assembly's procedure of express amendment or repeal of the text of a statute, as has been confirmed by the Supreme Court of The Gambia:

The provisions of the constitution and indeed any other statute cannot be repealed or amended impliedly. The repeal or amendment of the provision of the constitution or other statute has to be expressed by the clear words of the repealing constitutional or statutory provision. The legislative intent to repeal the express provisions of the constitution or other statute must be expressed and manifest in the clear wordings of the repealing constitutional or statutory provision.<sup>27</sup>

In the hierarchy of laws governing procedures in the National Assembly of The Gambia, the *Constitution* supersedes Acts, which in turn supersede Standing Orders.<sup>28</sup> Therefore, the Standing Orders of the National Assembly cannot repeal or supersede the *Interpretation Act* in case of conflict. In particular, Standing Order 80 cannot repeal or supersede section 11(d) of the *Interpretation Act* on the question of when subsidiary legislation shall have the force of law.

### **Towards resolving the conflict**

The purpose of judicial review is well-known. For instance, it has been stated in a Supreme Court of Canada case:

It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law. The corollary of this constitutionally protected principle is that superior courts may be called upon to review whether particular exercises of state power fall outside the law. We call this function “judicial review”.<sup>29</sup>

Section 108(2) of the *Constitution* states:

Notwithstanding anything to the contrary in this Constitution or in any other law, no decision, order or direction of the National Assembly or any of its Committees or the Speaker relating to the Standing Orders of the National Assembly, or to the application or interpretation of the Standing Orders, or any act done by the National Assembly or the Speaker under any Standing Orders, shall be inquired into by any court.

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<sup>27</sup> *United Democratic Party, National Reconciliation Party & Momodou K. Sanneh v The Attorney General*, Supreme Court Civil Appeal No.4/2007 [9].

<sup>28</sup> Standing Orders Workshop - National Assembly of The Gambia, [Summary Report](#), 8-10 April 2019, “Sources of Procedures and Powers of The National Assembly”, accessed 20 May 2020

<sup>29</sup> *Catalyst Paper Corp. v North Cowichan (District)* 2012 SCC 2 (CanLII), [2012] 1 SCR 5 [10] <<https://www.canlii.org/en/ca/scc/doc/2012/2012scc2/2012scc>> accessed 30 March 2020.

Section 108(2) bars the jurisdiction of the Courts. Its purpose appears to be the preservation of parliamentary sovereignty by insulating the parliamentary processes, procedures, institutions and leadership from judicial review. The Supreme Court of The Gambia has also pointed out what is a permissible judicial review of legislative action:

It is trite that this special power of judicial review of legislative action is limited exclusively to the striking down of legislation made in excess of the powers conferred under the 1997 Constitution, not those made *ultra vires* the powers conferred by some other enactment. In other words, this court will only strike down legislation which is found to be in violation of a constitutional provision, namely that the legislation is either inconsistent with, in breach of or in violation or contravention of the provisions of the Constitution.<sup>30</sup>

In this regard, it is questionable whether it is a valid exercise of the power of the National Assembly under section 108 (2) of the Constitution for it to make an Order that is inconsistent with primary legislation that is in force and to which it should give effect. In other words, could the adoption of Standing Order 80 by the National Assembly have exceeded the power conferred upon it by section 108 of the Constitution to make its Standing Orders?

It is also important to emphasise that there are limits to parliamentary sovereignty in The Gambia. Section 100(2) of the Constitution provides a compelling example of this:

The National Assembly shall not pass a Bill –

- (a) to establish a one party State;
- (b) to establish any religion as a State religion; or
- (c) to alter the decision or judgement of a court in any proceedings to the prejudice of any party to those proceedings or deprive any person retroactively of vested or acquired rights, but subject thereto, the National Assembly may pass bills designed to have retroactive effect.

In addition, the Supreme Court of The Gambia has espoused the supremacy of the *Constitution* in the legal system and over the National Assembly and State organs:

In a country without a written constitution but nonetheless governed by constitutional conventions as in the United Kingdom, the sovereignty and legislative supremacy of Parliament is the norm. By this supremacy is meant that there are no legal limitations upon the legislative competence of Parliament...

In The Gambia, with a written constitution based on the separation of powers, the position is different. Supremacy reposes in the Constitution, whether or not such is

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<sup>30</sup> Above n. 27, [2].

expressly declared by that instrument and not with the National Assembly or any other organ of state...

Section 5 [of the *Constitution*] empowers a person who alleges that an act of the National Assembly or any action or omission of any other person or authority is in contravention of the *Constitution* to seek a declaration from a competent court to that effect.

It cannot be over-emphasised that, given the supremacy of the *Constitution* over all other laws and acts or omissions of public authorities, it is important for all those involved in the exercise of the legislative authority of the state to exercise due care and caution to ensure that such legislation is consistent with the provisions of the *Constitution* and that it is enacted in accordance with the requirements and procedures of the *Constitution*...<sup>31</sup>

However, even if the Standing Orders could be the subject of a legitimate judicial challenge it might be undesirable to subject them to judicial review.<sup>32</sup> Rather, it is prudent for the National Assembly to seize the initiative and harmonise the different approaches under Standing Order 80 and section 11(d) of the *Interpretation Act* into a unified procedure. This will foster certainty in the parliamentary procedure.

### **Lessons learned from the Westminster-type parliamentary system**

Best practice in parliamentary procedure in the Commonwealth requires subsidiary legislation made pursuant to an enabling statute to be laid before Parliament.<sup>33</sup> However, it is sensible to establish the obligation to lay subsidiary legislation in the Constitution or primary legislation of general scope before outlining the procedure in the Standing Orders of Parliament.

In this regard, several jurisdictions have adopted one of two different approaches to dealing with this issue. For example, section 134(f) of the *Constitution of Zimbabwe* provides that where subsidiary legislation is contained in statutory instruments:

Statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny.<sup>34</sup>

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<sup>31</sup> *Jammeh v Attorney-General* (2002) AHRLR 72 (GaSC 2001) [18], [21], [22] and [32] (Jallow JSC)

<sup>32</sup> I adopt the view so eloquently expressed by Anne Twomey, "[Can Standing Orders Prevent a Simple Majority of the House of Representatives From Passing a Bill Against the Government's Wishes?](#)" *AUSPUBLAW*, 5 February 2019, accessed 27 March 2020: "It is likely that a court would treat standing Orders as non-justiciable. The Courts have generally proved reluctant to interfere with the 'intra-mural activities of the Parliament.'"

<sup>33</sup> Xanthaki, above n. 4, para 15.23 at 413 emphasises that most Commonwealth countries have established this obligation in their laws.

<sup>34</sup> Above n. 19.

Another example is provided by section 11(7) of the *Constitution of Ghana, 1992*:

Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall –

- (a) be laid before Parliament;
- (b) be published in the Gazette on the day it is laid before Parliament; and
- (c) come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of the twenty-one days, annuls the Order, Rule or Regulation by the votes of not less than two-thirds of all the Members of Parliament.<sup>35</sup>

In the foregoing examples, the obligation to lay subsidiary legislation is a constitutional requirement, but a case could also be made for establishing the duty by means of primary legislation of general application. For instance, section 34(1) of the *Interpretation and General Clauses Ordinance* of Hong Kong provides:

All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of that subsidiary legislation.<sup>36</sup>

Furthermore, section 38 of the *Legislation Act 2003* of Australia provides:

### **38 Tabling of legislative instruments**

(1) The Office of Parliamentary Counsel must arrange for a copy of each registered legislative instrument to be delivered to each House of the Parliament to be laid before each House within 6 sitting days of that House after the registration of the instrument.

(3) If a copy of a legislative instrument is not laid before each House of the Parliament in accordance with this section, the legislative instrument is repealed immediately after the last day for it to be so laid.<sup>37</sup>

The overarching objective of each of these examples is to provide for parliamentary scrutiny of subsidiary legislation. It is therefore understood that Parliament could establish a general obligation to lay subsidiary legislation in the *Constitution*, the *Interpretation Act* or other primary legislation of general application.

In my view, the *Interpretation Act* is the appropriate law of The Gambia for establishing the obligation to lay subsidiary legislation before the National Assembly because it already provides for the publication of subsidiary legislation in the *Gazette*. It is therefore advisable

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<sup>35</sup> Available at [https://www.constituteproject.org/constitution/Ghana\\_1996.pdf?lang=en](https://www.constituteproject.org/constitution/Ghana_1996.pdf?lang=en), accessed 27 March 2020.

<sup>36</sup> Historical Laws of Hong Kong Online – Laws of Hong Kong - *Interpretation and General Clauses Ordinance*, available at <https://oelawhk.lib.hku.hk/items/show/2179>, accessed 27 March 2020.

<sup>37</sup> Act No. 139 of 2003, available at <https://www.legislation.gov.au/Details/C2019C00084> accessed 19 June 2020.

for the National Assembly to adopt corrective measures to authorise the scrutiny of subsidiary legislation, specifically:

1. Suspend Standing Order 80 pending an amendment of section 11(d) of the *Interpretation Act* to resolve the inconsistency between them.<sup>38</sup>
2. Amend section 11(d) of the *Interpretation Act* to incorporate the approach proposed under Standing Order 80 of the Standing Orders.<sup>39</sup>
3. Amend section 102 of the *Constitution* by inserting a new paragraph giving the National Assembly the additional function of scrutinising or reviewing subsidiary legislation.<sup>40</sup>

Moreover, it is necessary for any amendment of section 11(d) of the *Interpretation Act* to stipulate that if subsidiary legislation is not laid before the National Assembly, it shall have no effect. This would not only afford the Assembly an opportunity to scale up its vital function of oversight of executive action but also guarantee that legal consequences follow any failure to comply with the obligation to lay subsidiary legislation before the Assembly. Professor Xanthaki and others have stated that the duty to lay subsidiary legislation cannot in this case be considered merely directory.<sup>41</sup>

### Other challenges lying ahead

Other serious issues the National Assembly might like to consider and be proactive about, as being germane to the proposed oversight of subsidiary legislation, include:

1. The potential for delay in approving or disallowing subsidiary legislation because of the volume of subsidiary legislation that could be laid before the Assembly by individuals and other bodies in each year.
2. The limited time the Subsidiary Legislation Committee of the Assembly might have to examine subsidiary legislation during sessions, as well as the likelihood of its Members being inundated with other commitments.

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<sup>38</sup> Order 144(1) of the Standing Orders provides: “Any of these Standing Orders may be suspended on a motion to that effect, submitted in accordance with Standing Order 52 [Notice of motions], and passed by the Assembly.”

<sup>39</sup> In amending s 11(d) of the *Interpretation Act*, the Assembly could draw inspiration from the text of the examples of the laws of Zimbabwe, Ghana, Hong Kong and Australia but with such adjustments as may be necessary.

<sup>40</sup> Although establishing the obligation to lay subsidiary legislation in the *Interpretation Act* implicitly empowers the National Assembly to scrutinise such legislation, it is appropriate to add the function of scrutiny of subsidiary legislation to s 102 of the *Constitution* which explicitly provides for the additional functions of the Assembly.

<sup>41</sup> Xanthaki, above n. 4, para 19.6 at 525; Bennion, above n. 4, section 10 at 47; D. Natzler et al., *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25<sup>th</sup> ed. (London: LexisNexis, 2019), para. 31.11 ([Laying before Parliament](#)). These authors have analysed the consequences that follow a failure to comply with a “mandatory” requirement, as opposed to a “directory” requirement, to lay subsidiary legislation before Parliament.

3. The dearth of experienced in-house legal advisers, legislative drafters, human rights specialists and other professionals of their ilk to assist the Members of the Subsidiary Legislation Committee in their crucial work.
4. The distinct possibility that an individual or a body to whom the National Assembly has delegated the power to make subsidiary legislation might be remiss in laying subsidiary legislation before the Assembly.
5. Furthermore, what are the legal consequences for failure to comply with the requirements of Order 80? In particular, could a failure to comply with the requirement to lay subsidiary legislation be considered an “omission which obstructs or impedes the National Assembly in the performance of its functions” and amount to contempt of the National Assembly under section 110 of the Constitution or Standing Order 137? This is debatable.

### Conclusion

I am of the view that the proposed National Assembly oversight of subsidiary legislation is laudable and warrants widespread support from all actors in the legislative sphere as it will promote accountability for the exercise of legislative power by the Executive and strengthen the capacity of the National Assembly in developing the law making process.

In any case it is advisable for the National Assembly to remedy the discrepancy between the procedure under section 11(d) of the *Interpretation Act* and the procedure under Standing Order 80 by properly vesting itself with the power to scrutinise subsidiary legislation.

Finally, since parliamentary staff might now be required to provide substantial legislative research and analytical services, including policy analysis, to the Subsidiary Legislation Committee, the National Assembly Service could consider placing an emphasis on staff development and training, that is, improving the skills and capacities of the available employees and increasing the staff complement to support National Assembly oversight of subsidiary legislation.<sup>42</sup>

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<sup>42</sup> According to s 111 of the *Constitution* the function of the National Assembly Service is “to provide services and support for the National Assembly”.

