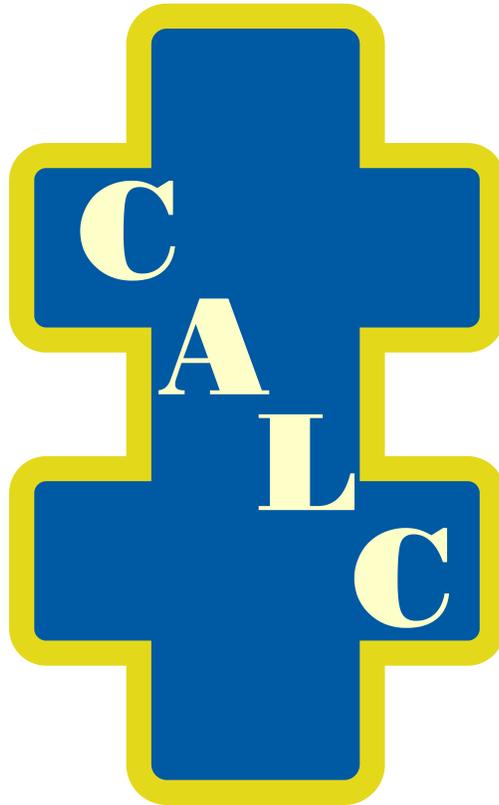


Commonwealth Association of Legislative Counsel

# THE LOOPHOLE



*March 2021 (Issue No. 1 of 2021)*

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

Issue No. 1 of 2021

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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**

Two years ago, many of us were anticipating the CALC Conference in Livingstone, Zambia. Today, our anticipation is more likely oriented towards being vaccinated against COVID-19 and its variants and the end of the health protection measures we have been living with since the beginning of 2020. However, the postponement of the 2021 Conference has not postponed thinking and writing about the legislative topics we would otherwise be preparing to discuss at that conference.

This issue begins with a reminder of the 2019 Conference in the form of Timothy Zeeman's article dealing with public access to municipal by-laws in terms of both making and understanding them. His article is based on his presentation at that conference and is an important reminder that much, if not most, legislation is made by local or municipal bodies such as the City of Cape Town in South Africa. This form of legislation deserves attention and, as he notes, is subject to accessibility requirements rooted in the same constitutional imperatives that apply to national or state legislation.

The next article turns to a topic that has rarely, if ever, been addressed in the context of legislation: euphemism. Richard Hughes takes us into the field of rhetoric and demonstrates that it does indeed have application to some aspects of legislative drafting. His article is written from an Australian perspective and draws attention to the social and political imperatives that sometimes result in legislative euphemism as well as the interpretive problems it can create.

Continuing on the theme of interpretation, Gabriela Dedelli examines the extent to which courts in Canada have noticed legislative drafting conventions when interpreting legislation. This too is a seldom addressed topic in the literature on legislative interpretation and her article is a plea for courts and other interpreters to pay more attention to conventions that generally apply to, if not define, legislative drafting.

Finally, this issue concludes with reviews of two recently published books dealing with legislation. Lucy Marsh-Smith review a collection of articles on European legislative drafting (including the UK and Ireland) edited by Ulrich Karpen and Helen Xanthaki. In turn, Dale Dewhurst reviews another collection of articles assembled by David Marcello from among the faculty of the International Law Drafting Institute at Tulane Law School in New Orleans. These books provide a wealth of information and insight from a wide variety of scholars and practitioners in the field of legislation. The reviews provide useful overviews of the matters they cover as well as the reviewers' comments on the usefulness of these books generally for those engaged in the preparation of legislation.

Happy reading!

John Mark Keyes

Ottawa, March, 2021

# The need to improve public access to municipal by-laws and involvement in making them

Timothy Zeeman<sup>1</sup>



## Abstract

*Public involvement in making and providing access to legislation holds the potential to create a climate of improved compliance. The Constitution of the Republic of South Africa requires public involvement in law-making and access to laws made in the national, provincial and municipal spheres of government. Most municipalities provide access, but not in a user-friendly format. By-laws are not consolidated, making reading and understanding very difficult even for those schooled in law, but more so for the public. Archaic language in by-laws further hinders understanding and compliance. Processes for public involvement in making by-laws have been implemented and have resulted in substantial public engagement in some instances. Improvements in these areas have not yet reduced ignorance of the law or achieved full public participation in making by-laws. Can focussing on the public's desire to participate in law-making and know the law bring about change?*

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## Introduction

Ignorance of the law is no excuse. This is all well and good only if you can find the law. However, in South Africa finding municipal by-laws is an arduous task that is not easily accomplished by the populace.

A by-law is a law passed by the council of a municipality to regulate the affairs and the services it provides within its area of jurisdiction. A municipality derives the powers to pass by-laws from the *Constitution of the Republic of South Africa, 1996* (the Constitution), which gives certain specified powers and competencies to local government as it sets out.<sup>2</sup> To access these by-laws you generally have to consult the individual municipalities to find them as each municipality has its own interpretation of how its by-laws should be made available for public consumption.

## Situational Context

South Africa underwent drastic changes since the adoption of its Constitution in 1996. The country evolved from having four provinces to nine. The changes impacted heavily on municipalities resulting in a system of local government that consists of three categories of municipalities, being metropolitan, district and local municipalities. The City of Cape Town (the City) is a metropolitan municipality, meaning it has exclusive legislative authority within its area of jurisdiction on matters set out for local government in the *Constitution*. The City historically consisted of approximately 30 smaller municipalities, which were disestablished in 1996 and then reconfigured and re-established into 6 larger municipalities. The development of a national suite of local government legislation<sup>3</sup> stemming from the Constitution brought about the disestablishment of these 6 larger municipalities in 2000. These 6 larger municipalities were then reconfigured and established into what is today known as the City of Cape Town<sup>4</sup>.

All of the 30 smaller pre-1996 municipalities and the 6 larger post-1996, or pre-2000, municipalities made by-laws, many of which still remain in force. Laws made by a municipal council which has since been dissolved and superseded by another municipality cannot be applied outside of the geographical area for which the law was made.<sup>5</sup> This

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<sup>2</sup> Part B of Schedules 4 and Part B of Schedules 5 to the Constitution

<sup>3</sup> The *Local Government: Municipal Finance Management Act, 2003* (Act 56 of 2003); *Local Government: Municipal Systems Act, 2000* (Act 32 of 2000); *Local Government: Municipal Structures Act, 1998* (Act 117 of 1998) and the *Local Government: Municipal Property Rates Act, 2004* (Act 6 of 2004)

<sup>4</sup> Section 12 of the *Local Government: Municipal Structures Act, 1998* (Act 117 of 1998) empowers the Member of the Executive Council for Local Government in a province to establish and disestablish municipalities by publication of an Establishment Notice in the relevant provincial gazette.

<sup>5</sup> Section 14(2)(b)(iv) of the *Local Government: Municipal Structures Act, 1998* (Act 117 of 1998) states that the establishment notice of a municipality that supersedes an existing municipality must speak to the continued application of any by-laws of the existing municipality. In the City of Cape Town context this section must be read together with item 16(1) of the Establishment Notice of the City of Cape Town which states that "Any by-law in force in the area of a disestablished municipality immediately prior to the effective

resulted in different laws being applicable in different areas within the jurisdiction of the City, which obviously complicates the enforcement of laws because these different laws applying in different area must be enforced in conjunction with the by-laws which have been passed by the Council of the City since its establishment in 2000. To add to this, the by-laws passed by the former municipalities are not readily available to members of the public.

The City is the successor in law<sup>6</sup> to all the disestablished municipalities that fall within its area of jurisdiction, meaning that the City is authorised to amend or repeal laws made by former municipalities. Repealing these laws is an ongoing mammoth task considering that we are dealing with laws made by 36 different municipalities over a period of more than 100 years.

In 2007 the City repealed 802 by-laws adopted by former municipalities. The repealed by-laws were unconstitutional and had fallen into disuse. In 2016 the City repealed a further 219 laws, many of which were still relevant but which conflicted with laws adopted by the Council of the City since 2000. We are currently in the process of reviewing approximately 500 more by-laws which need to be repealed. Many of these by-laws address matters that are not addressed in by-laws adopted by the City since its establishment in 2000. These by-laws address matters such as fences, boundary walls, the seashore and keeping bees, birds and poultry<sup>7</sup>. The laws relating to bees, for instance, can only be applied within three suburbs in the greater area of Cape Town because only three former municipalities had by-laws relating to bees and they are all different from each other. This creates a situation where Law Enforcement Officers are not sure of what can be enforced where, as the boundaries of these former municipalities are no longer clearly delineated. This obviously confounds the legal environment within which residents of the City live.

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date shall, with effect from the effective date, and pending the review and rationalization thereof in terms of section 15 of the Municipal Structures Act, remain of full force and effect within the area for which it was promulgated, subject to any amendment or repeal by the Municipality.”

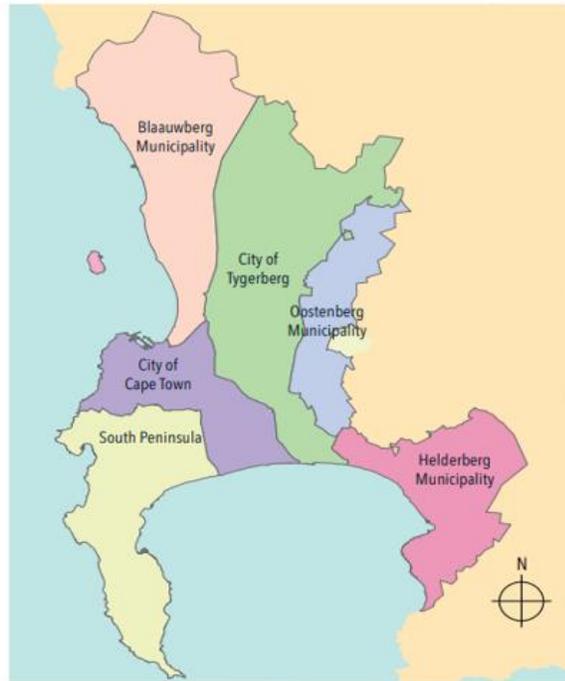
<sup>6</sup> Section 14(2) of the *Local Government: Municipal Structures Act, 1998* (Act 117 of 1998) says the superseding municipality becomes the successor in law of the existing municipality.

<sup>7</sup> All of these matters are being addressed in by-laws which are currently in the process of development.

**Situational Context Infographics:**



City of Cape Town former administrations and local authorities, pre-1996



City of Cape Town former interim Councils, 1996 to 2000

## **Public access to legislation**

### ***Legislative Context***

Chapter 7 of the Constitution requires that by-laws must be accessible<sup>8</sup> and that communities must have an opportunity to participate in their development.<sup>9</sup> These provisions are elaborated in the *Local Government: Municipal Systems Act, 2000* (the *Municipal Systems Act*).<sup>10</sup> Section 12(3) states:

- (3) No by-law may be passed by a municipal council unless –
  - (a) all of the members of the council have been given reasonable notice; and
  - (b) the proposed by-law has been published for public comment in a manner that allows the public an opportunity to make representations with regard to the proposed by-law.

Section 15 states:

- 15. (1) A municipality must compile and maintain in a bound or loose leaf form, and when feasible also in electronic format, a compilation of all its by-laws, including any provisions incorporated by reference as by-laws of the municipality.’
  - (2) This compilation, to be known as the municipal code, must be –
    - (a) constantly updated and annotated; and
    - (b) kept at the municipality’s head office as the municipality’s official record of all applicable by-laws.
  - (3) The municipality, at the request of a member of the public, must provide that person with a copy of or an extract from its municipal code against payment of a reasonable fee determined by the municipal council.

### ***The Municipal Code and Consolidation of by-laws***

The Municipal Code for the City contains 54 by-laws of which 20 are amendment by-laws. These by-laws were all passed by the Council of the City since its establishment in 2000. The Municipal Code does not include the by-laws adopted by former municipalities, many of which are still in force. Prior to the adoption of the *Municipal Systems Act*, there was no requirement for a municipality to compile and maintain a Municipal Code. The Department of Local Government in the Provincial Government of the Western Cape was however very meticulous in maintaining a list of all the by-laws passed by the 30 municipalities within its

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<sup>8</sup> Section 162(3) of the Constitution states: “Municipal by-laws must be accessible to the public.”

<sup>9</sup> Section 160(4)(b) of the Constitution states: “No by-law may be passed by a Municipal Council unless – (b) the proposed by-law has been published for public comment.”

<sup>10</sup> Act 32 of 2000.

area of jurisdiction and updated the list whenever new by-laws or amendments to existing by-laws were passed by the various municipalities.<sup>11</sup>

When a by-law is passed by Council, it takes effect only once it is published in the *Provincial Gazette*.<sup>12</sup> A copy of the by-law as published in the *Provincial Gazette* is published on the City's website when it is available in a PDF format. All by-laws passed by the Council of the City are available on the City's website. The by-laws are also available in loose-leaf form.

The City does not consolidate by-laws. No law-making authority in South Africa consolidates its own amendments into the principal law. Consolidation and annotation of amendments into the principal laws in South Africa is undertaken by two private companies: Lexis Nexis<sup>13</sup> and Jutastat.<sup>14</sup> They however consolidate and annotate only on national and provincial laws.

When national and provincial laws are enacted, they are published in the *Government Gazette* or the relevant provincial gazette. These companies then undertake the consolidation and annotation of the laws, at no cost to the Parliament of the Republic of South Africa or to the relevant provincial legislature. The costs relating to the consolidation and annotation of amendment laws are recovered through the sale of licences to businesses, government institutions and members of the public. Lexis Nexis and Jutastat versions of laws are widely accepted as the most up to date laws. The companies have previously said<sup>15</sup> it does not make business sense for them to consolidate municipal by-laws as the readership is very small in comparison to the readership of national and provincial laws. They are however prepared to undertake the consolidation of by-laws, but at a cost to municipalities.

The City is, legislatively speaking, more progressive than many of the other municipalities in South Africa. The City's by-laws are often used as the benchmark from which other municipalities develop their by-laws. This is true for local, district and metropolitan municipalities throughout the country. The readership of the City's by-laws would therefore be much wider than readership of smaller municipalities or even other metropolitan municipalities, yet the cost of consolidation by the private companies remains unjustifiable as the money would inevitably have to be taken from money that could be utilised for the delivery of more tangible services such as providing electricity, water and sanitation. If this

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<sup>11</sup> The Province provided the City with a list and copies of all the by-laws and amendments passed by all the municipalities within the jurisdiction of what is now the City. One of the laws in the list dated back to 1909 and dealt with the establishment of cemeteries in the seaside village of Kalk Bay, which was previously a municipality. This by-law had never been repealed and was still enforceable, but was in direct conflict with the City's *Cemeteries, Funeral Undertakers and Crematoria By-law* adopted by Council in 2011.

<sup>12</sup> Section 13(b) of the *Local Government: Municipal Systems Act, 2000*, Act 32 of 2000. The *Provincial Gazette* is defined in s. 1 as "the official gazette of the province concerned".

<sup>13</sup> Lexis Nexis is a South African publisher of laws.

<sup>14</sup> Jutastat or Juta is a South African legal publisher

<sup>15</sup> At meetings held with Lexis Nexis and Jutastat to discuss the consolidation of the City's by-laws.

were to materialise it would improve access to legislation, but not for the average person on the street as only holders of subscription licences can access laws consolidated by these companies. It would make the by-laws more accessible, but not for all.

The fact that our by-laws are not consolidated and annotated means that a person who would like to, for instance, undertake a development in Cape Town would have to access the City's *Municipal Planning By-law, 2015*, together with two amendments passed by Council in 2016, one amendment in 2017 and another amendment in 2019. This means the applicant would have to consult five different published by-laws to understand the framework within which the application should be submitted. A 2021 amendment to the City's *Municipal Planning By-law, 2015* is currently being prepared for public participation, so soon it would require that six by-laws need to be read to understand one framework.

A PDF version of a by-law is not necessarily the best format to use to make the by-laws accessible. Some of the copies of by-laws published on the City's website are not searchable<sup>16</sup>, making it very difficult for drafters, officials and the general public to find specific sections or topics addressed in the by-law without having to read through the entire by-law or flip back to the table of contents. The by-laws can therefore be said to be accessible, but the access is not practicable. The access being provided, even though it is in an electronic format, is not searchable or editable. One cannot extract excerpts from the by-law, but has to retype sections that are needed when one is required to reference a by-law.

While the City does enjoy having the reputation of being one of the most, if not the most, progressive municipality in the country, the manner in which its by-laws are made accessible to the public leaves a lot to be desired. Consolidation, annotation and digitising the by-laws published on the City's website to make them more readable and more user-friendly are some of the simpler ways in which better, more practical, access to them can be achieved.

The City's Legislative Development team has begun consolidating by-laws, but because this is not always seen as a priority project it often takes a back seat, so to speak, to some of the more pressing legislative matters within the City.

### ***Modernising Legislative Language***

We live in a modern world where information on almost every topic is available at the click or flick of a finger across a screen that is usually within an arm's reach of wherever we are, no matter what we are doing. Sadly, this 'available information' does not, in South Africa, include laws or explanatory articles on laws. Even where the members of the public do manage to access applicable laws, they do not understand the laws.

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<sup>16</sup> The City generates searchable PDF's for recent by-laws, but by-laws stemming from older disestablished municipalities and earlier by-laws made by the City are basically photocopies of by-laws as published in the Provincial Gazette. These are impossible to search without re-creating the by-law in a searchable format.

Working through and trying to remedy all the hindrances mentioned above can improve access to the law, but understanding the law, once access has been obtained, is a matter that requires just as much modernisation as the manner of access to law. Perhaps the language used in the development of laws is still a remnant from the times when laws were written in a manner that only those schooled in law could understand.

This takes us back to the maxim that ignorance of the law is no excuse. Despite this being one of the fundamental principles of law, dating back to Roman-Dutch times, taught to us at the outset of our legal studies, we have not yet reduced ignorance of the law. We say we must enhance access and improve language usage, yet we live in a world where laws are written for legal practitioners to understand and interpret. The best key to unlock the meaning of law, for the citizens who have to comply with the law, is the language used to write the law. The City's Legislative Drafting team firmly believe that simplifying language used in law leads to better understanding of the law, which could greatly enhance general compliance with by-laws and reduce the resources dedicated to enforcing them.

The City has been pushing the cause of simple language for a number of years already. Some of the older by-laws in the City are drafted in archaic language which is difficult to understand and therefore also difficult to comply with. Because of the greater scope for varied interpretation, the City is often caught up in litigation that would not have been necessary had its by-laws been drafted in simpler language.

The Legislative Development team is often required to assist Law Enforcement in compiling standard operating procedures to enhance the application and enforcement of by-laws. This is most often the case with older by-laws as even the officials who are tasked with enforcing them find it hard to understand them. This is completely understandable because enforcement officials are generally not schooled in law.

The City of Cape Town is in the process of developing means to make administrative processes and applications easier and more accessible to the public. Property development applications can already be made online and notifications are sent to applicants at each step along the line of approval through the various departments in the City. Appeal procedures are also being brought into the online arena, all with the aim of reducing the time taken to obtain approvals. This is progress, and it is doing wonders for industries and businesses that interact with the City on various platforms.

The City's Law Enforcement Department, in collaboration with the City's Information Systems and Technology Department (IS&T), is in the process of developing a cell phone application for law enforcement officers<sup>17</sup> to access all the different charges stemming from the by-laws. The application will assist in framing the charges on the charge sheets or the

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<sup>17</sup> Law enforcement officers are appointed in terms of the *Criminal Procedure Act, 1977* (Act 51 of 1977) and are authorised to enforce all the by-laws made by a municipality and certain national laws including the *National Road Traffic Act, 1996* (Act 93 of 1996), *Criminal Procedure Act, 1977* (Act 51 of 1977) and *Second Hand Goods Act, 2009* (Act 6 of 2009).

finer; it will quote the relevant section of the relevant by-law or national law and will reduce the amount of time spent writing up fines. It will also reduce inaccuracy in enforcing the by-laws as it will bring up all possible charges for any specific act or key-word that is searched on the application. The law enforcement officer then selects the relevant or most relevant charge and this then feeds through to a printer, together with the relevant provision of the by-law in the compilation of the fine. This is designed specifically for, and will enhance, the enforcement of by-laws, but lessons can be learned from this process to enhance access to the by-laws.

The City's Legislative Development Team has been in communication with IS&T and the Law Enforcement Department to establish the feasibility of using data that is currently being processed to develop the application. to give direct access to all the by-laws passed by the City. This will bring access to by-laws into the 21<sup>st</sup> century as it will be digitised and coded for viewing and use on cell phones which is the most common form of data consumption in South Africa. The development of an application providing access to by-laws for use by the general public will eliminate most of the hurdles currently being experienced in relation to accessing by-laws.

While the City's website, which includes the Municipal Code, is easily accessible and can be viewed on a cell phone, the current format in which by-laws are displayed is not optimal and is not user-friendly enough to provide the meaningful access that residents deserve. Digitising and coding by-laws to make them more user-friendly will go a long way towards enhancing access to by-laws.

## **Public involvement in the legislative process**

### ***Constitutional and Legislative Context***

The South African Constitution is hailed as one of the most progressive in the world. One of the reasons for this is because it entrenches public participation and access to laws as a crucial element of the country's democratic governance.

The Constitution even provides for remedies that are often used by members of the public when they feel they were not adequately consulted in the development of laws or in their implementation. Section 32 of the Constitution states that everyone has the right to have access to any information held by the state.<sup>18</sup> The *Promotion of Access to Information Act, 2000*<sup>19</sup> was developed to give effect to the constitutional right of access to information. It

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<sup>18</sup> Section 32 also requires the enactment of national legislation to give effect to this right.

<sup>19</sup> Act 2 of 2000.

sets out the circumstances and procedures under which information may be requested from the state.<sup>20</sup>

Section 33 of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.<sup>21</sup> This led to the development of the *Promotion of Access to Administrative Justice Act, 2000*, which seeks to ensure that administrative decisions are fair and gives citizens the right to request reasons for administrative decisions.<sup>22</sup>

Sections 59 and 118 of the Constitution require the National Assembly (Parliament) and the provincial legislatures to facilitate public involvement in their legislative and other processes and their various committees. It further requires them to conduct their business in an open manner and hold their sittings in public. Preventing media and public access to the sittings of committees is prohibited, unless it is reasonable and justifiable to exclude their access in an open and democratic society. The right for everyone to be involved in the deliberations of Parliament or a provincial legislature in law-making is therefore constitutionally guaranteed.

In relation to by-laws of municipal councils, the Constitution states the following in section 164(4):

- (4) No by-law may be passed by a Municipal Council unless –
  - (a) all the members of Council have been given reasonable notice; and
  - (b) the proposed by-law has been published for public comment.

Section 160(7) of the Constitution states:

- (7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being conducted.<sup>23</sup>

### ***Legislative processes in the City of Cape Town***

The City adopted a policy on the confidential meetings of Council and its committees. It sets out the circumstances under which the Council would be able to close its meetings to the public.<sup>24</sup> Section 160(2) of the Constitution sets out functions that may not be delegated by a

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<sup>20</sup> *Promotion of Access to Information Act, 2000*, Act 2 of 2000 also makes provision for a person to request information from any other person where the information is required for the exercise or protection of any rights.

<sup>21</sup> Section 33 also requires the enactment of national legislation and provides for the judicial review of administrative action.

<sup>22</sup> Section 5 of the *Promotion of Administrative Justice Act*, Act 3 of 2000.

<sup>23</sup> It is interesting to note that the yardstick for determining when municipal councils may close their meetings to the public, including the media, is different from that applied to provincial legislatures and to Parliament.

<sup>24</sup> Circumstances under which Council meetings may be closed include when

municipal council. One of these is the passing of by-laws.<sup>25</sup> The policy on the confidential meetings states that meetings for considering functions or matters that cannot be delegated by Council cannot be closed to the public. The right of the public to be involved in the legislative process is therefore constitutionally guaranteed.<sup>26</sup> It is then elaborated in section 13(3) of the *Municipal Systems Act*, which states:

(3) No by-law may be passed by a municipal council unless –

...

(b) the proposed by-law has been published for public comment in a manner that allows the public an opportunity to make representations with regard to the proposed law.

This right is also entrenched in various City policies and standard operating procedures. To ensure consistency in the manner in which policies and by-laws are developed, the City has developed a Policy and By-law Approval Process which sets public participation as one of the gates that need to be checked before a policy or by-law can be submitted to Council for approval.<sup>27</sup>

The City has also developed a Standard Operating Procedure on Public Participation which sets out the rules that must be followed in engaging the public. A public participation plan is developed by the relevant department and the Public Participation Unit for each matter being published for comment. The purpose of the public participation plan is to determine the exposure required and the media, including social media, and ICT platforms that are to be utilised in engaging the public.<sup>28</sup> Once the public participation process has been completed, a report is compiled to set out all the comments received, the City's response to each comment and the resulting changes made to the policy or by-law based on each comment received.<sup>29</sup>

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- it will result in unreasonable disclosure of personal information of a third party;
  - it will result in the disclosure of trade secrets and intellectual property of the City or a third party;
  - disclosing information would breach a duty of confidence owed to a third party;
  - failure to do so could reasonably be expected to endanger life or physical safety of councillors or members of the public attending the meeting.

<sup>25</sup> Other functions which may not be delegated by a municipal council are the approval of budgets, the imposition of rates and taxes and the raising of loans.

<sup>26</sup> Section 160(4)(b) read with subsection (7) of the Constitution.

<sup>27</sup> Consultation with industry leaders and other stakeholders in the development of the draft by-law is a key part of the legislative process. This is usually undertaken by the various departments who liaise directly with the stakeholders on the proposed provisions of the draft by-law.

<sup>28</sup> The public participation plan will also include information on how people with disabilities can access the draft by-law or policy and what assistance is available to them in the preparation of any comments they may wish to submit.

<sup>29</sup> This report serves the relevant Portfolio Committee and may be recommended to Council for approval.

### ***Public perception of documents published for comments***

Cape Town and surrounding areas experienced the worst drought in living memory in 2018. Water restrictions have been relaxed, but the City is on tenterhooks until it can be seen what the next few rainy seasons will yield.

The drought coincidentally coincided with the amendment of the City's *Water By-law* which was approved by Council in 2010. Because of the drastic measures put in place by the City to ensure a sufficient supply of water until the start of the rainy season in 2018, and the vast coverage the drought was receiving locally, nationally and internationally, water was the main topic of discussion in all circles across the city. When the *Water Amendment By-law* was published for public comment, it garnered 48 000 comments from the public. The City's Investment Incentives Policy,<sup>30</sup> which was published for public comment around the same time as the *Water Amendment By-law*, received a mere handful of comments.

Public perception was that the amendment of the *Water By-law* was linked to the drought and that it was intended to give the City more powers needed to alleviate the drought. The reality was that the amendment actually dealt with the nuts, bolts and pipes required for ducting water to users and had very little, if anything, to do with the drought.

The timing of the amendment to the *Water By-law* and the current situation at the time created a hype that generated a record number of comments. It was beautiful and painful all at the same time. Never before had the City to deal with developing responses to 48 000 comments on one by-law.

### **Conclusion**

In the part of this paper dealing with access to legislation and the part dealing with the involvement of the public in the legislative process we can see that national legislation was enacted to give effect to constitutional principles guaranteeing access to, and involvement in, legislative processes. These legislative provisions are encapsulated in the City's policies and procedures to ensure that members of the public have access to legislation and that they can be involved in the development of by-laws or legislative processes ... if they want to make use of the opportunities and mechanisms available to them. Constitutionally and legislatively speaking, the opportunities are there.

There is an African Proverb which says "You can take a goat to the river, but you can't make it drink the water." We have laws. We have mechanisms and procedures to encourage and enable better access and better participation. These mechanisms may not be perfect and there is room for improvement, but they are available. The mechanisms have been reviewed, amended and improved over a number of years through various administrations and still we

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<sup>30</sup> The Investment Incentives Policy provides the framework within which decisions can be made to relax fees and services due to the City by developers in response to employment opportunities generated by developments.

find ourselves discussing ways to enhance access to, and involvement in, legislative processes. Perhaps, in a varied effort to do this, we should concentrate for a while on making sure the goat is thirsty before we lead it to the river. Then, the goat will drink ... until its thirst is quenched.

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# When a Spade is not a Spade: Euphemisms in Legislation

Richard Hughes<sup>1</sup>



## Abstract

*This paper considers euphemisms in English and discusses their use in legislation with particular reference to the State of Victoria. It first contextualises euphemisms alongside their opposite (dysphemisms), and neutral terms (orthophemisms: neither “sweet-sounding, evasive, overly polite ... nor harsh, blunt or offensive”). It then considers types of euphemism and identifies two examples of their use in legislation.*

*The first pertains to provisions dealing with sexual offences where historical reticence to using plain language to describe sexual acts has created unnecessary work for readers (including the courts) and produced wording that has become outdated. The article goes on to consider euphemisms in the disability context, noting changes in legislative wording used in Victoria and other common law jurisdictions, as well as Poland and Spain. These changes have involved shifting from medical to social terminology and referring to the person before the disability descriptor.*

*The article concludes legislative drafters should be cautious in describing people with disabilities, but they should use more direct language when dealing with sexual offences. However, in both cases the words used should be neutral (orthophemistic) and euphemisms should be used only with special care.*

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<sup>1</sup> Assistant Parliamentary Counsel, Office of the Chief Parliamentary Counsel Victoria. This article is written in my personal capacity and reflects my personal views only. My sincere thanks to my colleague Paul O'Brien and to the anonymous reviewers for their helpful comments. Any errors that remain are my own.

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## Introduction

One of my favourite literary devices has always been the euphemism. The Macquarie Dictionary currently defines euphemism as “the substitution of a mild, indirect, or vague expression for a harsh, blunt or offensive one”.<sup>2</sup> But no definition will reveal the wide range of situations where this literary device is put to work, nor the motivations behind its use.

The euphemism transcends languages and cultures. Its development and usage provide key insights into the way we express ourselves and the subject matter we find most difficult to communicate. In the English language, examples are endless. Your grandmother is a senior citizen, not an old person. She will not die, she will pass away. A public authority does not carry out torture, it uses enhanced interrogation techniques. My statement did not contain lies, only alternative facts.<sup>3</sup> And, as my father sometimes said during my childhood, I was vertically challenged, not short.<sup>4</sup>

The euphemism is “the deodorant of language”.<sup>5</sup> This has advantages and disadvantages. A euphemism may help us to avoid shocking or offending someone, but if an expression is too euphemistic or too rarely used, it may not be understood properly by someone else. This can happen in legislation too.

This article will briefly consider some of the existing academic research on the euphemism as a literary device before considering the way in which euphemisms have been used in legislation. It will also consider expressions that are the opposite of euphemisms (dysphemisms) and expressions that are neither euphemisms nor dysphemisms

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<sup>2</sup> *Macquarie Dictionary* (online at 24 October 2020) “euphemism”.

<sup>3</sup> See interview with Kellyanne Conway, Counselor to the President of the United States of America (Chuck Todd, Meet the Press, 22 January 2017).

<sup>4</sup> For a humorous take on these and other examples, I highly recommend George Carlin's 1990 stand-up comedy show Parental Advisory.

<sup>5</sup> Richard Eder, “Scholarly Essays Offer the Last Word in Euphemisms”, *Los Angeles Times* (online, 10 July 1985) <<https://www.latimes.com/archives/la-xpm-1985-07-10-vw-7862-story.html>>.

(orthophemisms). The general contention is that, in the era of plain language legislation, the euphemism has largely fallen out of favour and rightly so. However, euphemisms may still be appropriate in certain circumstances, including circumstances not yet known to our laws. Further, this article will remind the reader that it may not always be best to adopt the bluntest language possible in legislation. Some degree of nuance may be required.

### Is that a euphemism or not?

How do we know if a word is a euphemism for something else? This is a subjective determination and the answer depends on the context, although some expressions are almost universally recognised as euphemisms (“to pass away” is an easy example).

Kate Burridge has identified six separate (but overlapping) types of euphemism and their respective functions in context—

- (a) the *protective* euphemism, to shield and to avoid offence (for example, “person of size” instead of “obese person”);
- (b) the *underhand* euphemism, to mystify and to misrepresent (for example, “negative patient care outcome” instead of “hospital death”);
- (c) the *uplifting* euphemism, to talk up and to inflate (for example, “accommodation for stationary vehicles” instead of “parking bay”);
- (d) the *provocative* euphemism, to reveal and to inspire (for example, “African American” instead of “black”);
- (e) the *cohesive* euphemism, to show solidarity and to help define “the gang” (for example, in the hospitality industry, “86-ing a patron” instead of “ejecting someone”);
- (f) the *ludic* euphemism, to have fun and to entertain (for example, “the differently pleased” instead of “sadomasochists”).<sup>6</sup>

I wager that all but perhaps the last of these types of euphemism have, at some point and in some jurisdiction, found their way into legislation.<sup>7</sup> Take, for example, section 32(1)(b) of the *Housing Act 1982* (NT)—

1. Despite the Local Government Act 2008: ...

(b) the Chief Executive Officer (Housing) is liable for payment of a charge made by the Council of a local government area for a service provided for the removal of night-soil or garbage in respect of the land on which a dwelling is situated.

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<sup>6</sup> Kate Burridge, “Euphemism and Language Change: The Sixth and Seventh Ages” (2012) 7 *Journal in English Lexicology* 65 at 66-71.

<sup>7</sup> Regarding the last type, even if the process of drafting legislation is rewarding and intellectually stimulating, the law is not for having fun or entertaining!

For any who are blissfully unaware, the term “night soil” is a rather dated expression to refer to human faeces.<sup>8</sup> The historical context for this term was the practice of collecting human faeces (night-soil) from cesspools, privies, septic tanks and similar places during the night, particularly for use as fertiliser. This term could be characterised as an “underhand” euphemism. As another example and in the context of the COVID-19 global pandemic, consider the recent usage of the term “jobseeker” in social security legislation passed through the Australian Parliament.<sup>9</sup> The term “jobseeker” is a more optimistic term than, say, “unemployed” and, without necessarily passing judgement on its legitimacy or appropriateness, this could be characterised as an “uplifting” euphemism.

Burridge has also identified three broad (but overlapping) methods by which a euphemism (of any type) may be created—

- (a) *analogy*, to generalise existing words or phrases to apply in new situations (for example, “over the hill” instead of “too old”);
- (b) *distortion*, to modify existing words or phrases (for example, “70 years young” instead of “70 years old”);
- (c) *borrowing*, to incorporate words or phrases from elsewhere (for example, “faux pas” instead of “embarrassing mistake”)<sup>10</sup>

I wager again that each of these methods may be detected in legislation across the common law world and I hope that the reader will ponder which of these may have been used in the reader’s jurisdiction. To continue with an example from above, the use of the term “night soil” in its specific context demonstrates how two existing words (“night” and “soil”) are joined to create a new meaning in a new situation, thus a euphemism by analogy. The reader may also identify some euphemisms by distortion in the context of disability later in this article.

One view is that euphemisms are often expressions of political correctness and therefore they should be stubbornly avoided.<sup>11</sup> On this view, a euphemism is an instrument of public discourse used by others to pursue broader ideological goals. The opposing view is that accusations of political correctness themselves reveal a desire to maintain existing privilege and freedom to abuse, barely masked by platitudes about the need to be “straight-talking” or to use “common sense”. I will come back to this point later in a specific context.

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<sup>8</sup> See also *Macquarie Dictionary* (online at 24 October 2020) “nightsoil”: the contents of outdoor toilets, cesspools, etc., when removed as part of a sanitation system”.

<sup>9</sup> See generally *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) and *Social Security Act 1991* (Cth).

<sup>10</sup> Burridge, above n. **Error! Bookmark not defined.** at 72-73.

<sup>11</sup> See, for example, James Valentine, “Naming the Other: Power, Politeness and the Inflation of Euphemisms” (1998) 3(4) *Sociological Research Online* [8.1]-[8.11].

## Euphemisms, dysphemisms and orthophemisms

Naturally, the English language also has a word for the opposite of a euphemism: a *dysphemism*. The Macquarie Dictionary defines dysphemism as “the substitution of a harsh, disparaging or offensive expression for a mild or agreeable one (opposed to a *euphemism*)”.<sup>12</sup> To refer to words that are neither euphemisms nor dysphemisms, Burrige has coined the term *orthophemism*: a word or phrase that is neither “sweet-sounding, evasive, overly polite ... nor harsh, blunt or offensive”,<sup>13</sup> but this word is yet to appear in the Macquarie Dictionary. To illustrate the spectrum created by these three literary devices, consider once more the term “night soil”. As above, this is a euphemism for human faeces, and that phrase in turn could be characterised as an orthophemism. A dysphemism, for the reader who may not have already thought of one, could be “shit”.

The most appropriate words to use in legislation are therefore likely to be orthophemisms which reflect a plain language style of writing. However, it may still be the case that an orthophemism is not widely understood or does not fully reveal the intent of the legislation. For example, if a provision in legislation states that a person's appointment to a statutory office ends when the person “dies”,<sup>14</sup> that would be a widely understood and accepted orthophemism. There is no need to use “pass away” or, at the other extreme, “cark it”.<sup>15</sup> On the other hand, Victoria has passed several pieces of amending legislation which contained the word “hoon” in their short titles.<sup>16</sup> A “hoon” is a “fast, reckless driver of cars or boats”<sup>17</sup> and this term is reasonably well understood in Australian parlance. I appreciate that it may be a completely baffling term to the non-Australian reader, who would probably have no idea whether it is a euphemism or a dysphemism. Nonetheless, it is a colloquial and dysphemistic term which has now gained some formal usage in the law. Although the term is not used in any substantive provisions of Victorian legislation (as opposed to the short titles of Acts), it is nonetheless a catchy term to encompass a set of provisions concerning deliberately reckless and dangerous driving.

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<sup>12</sup> *Macquarie Dictionary* (online at 24 October 2020) “dysphemism”.

<sup>13</sup> Kate Burrige, “Taboo, euphemism and political correctness” in Keith Brown (ed), *Encyclopaedia of language and linguistics*, 2<sup>nd</sup> ed. (Amsterdam: Elsevier Ltd., 2006) at 455, 457.

<sup>14</sup> See, for example, *Game Management Authority Act 2014* (Vic) s 11(2)(d) (“The office of a member becomes vacant if the member ... retires, resigns or dies.”).

<sup>15</sup> This term is slang in an Australian, New Zealand or British context: see *Outback Dictionary* (online at 24 October 2020) “cark it” <<https://outbackdictionary.com/cark-it/>>.

<sup>16</sup> *Road Safety Amendment (Hoon Driving) Act 2010* (Vic); *Road Safety Amendment (Hoon Driving and Other Matters) Act 2011*; *Transport Legislation Amendment (Hoon Boating and Other Amendments) Act 2009* (Vic).

<sup>17</sup> *Macquarie Dictionary* (online at 24 October 2020) “hoon”. For completeness, there are actually six separate nominal meanings and one verbal meaning for this word in the current edition of the *Macquarie Dictionary*, but my view is that the one quoted above is the most common.

A word or expression may be used as a euphemism at one time only to become a dysphemism later. This euphemism “treadmill”<sup>18</sup> may seem quite self-defeating. People who once thought they were being appropriately respectful in referring to their friendly neighbour as the “negro” man or the “handicapped” woman understandably do not like being told that they are now rude or intolerant. But that is the nature of language: it evolves, and so too does the law. This evolution in language even leads to the creation of entirely new terms—neologisms.<sup>19</sup> Although there is undoubtedly some overlap between neologisms and euphemisms (a term may be both), this article focuses only on the latter.

### Euphemisms in sexual offences

Unsurprisingly, one of the most fertile grounds for the euphemism has always been the topic of sex. Children are taught about “the birds and the bees”. Othello and Desdemona made “the beast with two backs”.<sup>20</sup> My friend “slept with” someone on the weekend.<sup>21</sup> Consider also the following passages of the King James Bible, which mention Adam, Cain and their respective wives—

1. And Adam knew Eve his wife; and she conceived, and bare Cain, and said, I have gotten a man from the Lord.

...

17. And Cain knew his wife; and she conceived, and bare Enoch: and he builded a city, and called the name of the city, after the name of his son, Enoch.

...

25. And Adam knew his wife again; and she bare a son, and called his name Seth: For God, said she, has appointed me another seed instead of Abel, whom Cain slew.<sup>22</sup>

In these Bible passages, “knowing” someone clearly means engaging in sexual intercourse. So why do these passages not simply say what they mean? The answer: because “knowing” someone is a mild, indirect or vague way of conveying the same message. The passages, as they have been translated into English, avoid what some people find to be uncomfortable subject matter.

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<sup>18</sup> Keith Allan and Kate Burridge, *Forbidden Words: Taboo and the Censoring of Language*. (Cambridge: Cambridge University Press, 2006) at 99.

<sup>19</sup> See *Macquarie Dictionary* (online at 24 October 2020) “neologism”: 1. a new word or phrase ... 2. the introduction or use of new words, or new senses of words. 3. a new doctrine.”

<sup>20</sup> William Shakespeare, *Othello* (Act I, Scene I).

<sup>21</sup> This particular euphemism seems to have endured since the 10th century: see Burridge, above n 6 at 82.

<sup>22</sup> *King James Bible*, Genesis 4:1, 17, 25.

In many historical contexts, this particular understanding of “knowledge” has been modified with the adjective “carnal”. The Macquarie Dictionary currently has three separate definitions for this word—

1. *not spiritual; merely human; temporal; worldly.*
2. *relating to the flesh or the body, its passions and appetites; sensual.*
3. *sexual*<sup>23</sup>

The last of these is the most relevant for our present purposes, although the first two are also relevant. Hence the title of the 1971 movie *Carnal Knowledge*, starring Jack Nicholson, Art Garfunkel and Candice Bergen! Given its historical usage, it should come as no surprise that the phrase “carnal knowledge” has been adopted in many legal systems and, consequently, in legislation.

### The Victorian context

In Victoria, the statute law on criminal matters was initially consolidated in the *Criminal Law and Practice Statute 1864* (Vic), which was derived from the *Offences Against the Person Act 1861* (UK).<sup>24</sup> The current consolidation is the *Crimes Act 1958* (Vic).<sup>25</sup>

As originally enacted, the *Crimes Act 1958* (Vic) contained the following provision at the end of Division 1 of Part 1—

70. Whenever upon the trial for any offence punishable under this Division it is necessary to prove carnal knowledge it shall not be necessary to prove the actual emission of seed in order to constitute carnal knowledge; but the carnal knowledge shall be deemed complete upon proof of penetration only.<sup>26</sup>

For this section, the heading placed in the margins of the Act was “Carnal knowledge defined”.<sup>27</sup> However, the provision does not actually say what carnal knowledge “is”; rather, it tells the reader how to “prove” it. We are left to do the remaining mental work ourselves.<sup>28</sup> By my count, at that time there were fifteen separate sections in that Division which relied on or otherwise used the concept of carnal knowledge.<sup>29</sup> It was clearly an essential “definition” in the context of Victoria's sexual offences. We may also think of it as a term of

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<sup>23</sup> *Macquarie Dictionary* (online at 24 October 2020) “carnal”.

<sup>24</sup> This UK statute is still force, although significant changes have been made over more than a century.

<sup>25</sup> The intervening consolidations were the *Crimes Act 1890* (Vic), the *Crimes Act 1915* (Vic), the *Crimes Act 1928* (Vic) and the *Crimes Act 1957* (Vic).

<sup>26</sup> *Crimes Act 1958* (Vic) s 70, as enacted.

<sup>27</sup> Note that, prior to 1 January 2001, headings to provisions in Victorian Acts were not considered to form part of the Act: see *Interpretation of Legislation Act 1984* (Vic) s 36(2A)(a).

<sup>28</sup> Although the courts have necessarily been required, at various times, to explain the subject matter more directly. See the discussion later in this article of *R v Lines* (1844) 174 ER 861.

<sup>29</sup> *Crimes Act 1958* (Vic) ss 46-50 and 52-62, as enacted.

art,<sup>30</sup> but first and foremost it was a legal euphemism. Was it *necessary*, in the abstract, to use such a euphemism? I would say not.<sup>31</sup> The obfuscating nature of a phrase like “carnal knowledge” leaves too much work to the reader (and any person bound by its use in law, for that matter) to determine its legal effect and application. As shown above, the word “carnal” has more than one meaning. So too does the word “knowledge”.<sup>32</sup> Used together, they have allowed society to talk about sex in the law without actually talking about sex. This can be a dangerous proposition.

To illustrate my point, consider the grounds of appeal and the respective reasoning of Chernov JA and Neave JA in the 2007 Victorian Court of Appeal decision in *R v DD*.<sup>33</sup> In this case, the Court was required to consider an appeal against conviction by a jury of the County Court of Victoria of one count of incest and seven counts of indecent assault. The convictions related to events between October 1972 and September 1975 and involved two of the appellant's daughters and one of the daughters' friends.

One of the grounds of appeal was that the conviction for incest was unsafe and unsatisfactory because—

- a. no reasonable jury properly instructed could have been satisfied beyond reasonable doubt that the appellant was guilty of that offence given that it was not open to exclude the possibility that the alleged carnal knowledge (or “sexual penetration”) did not actually occur;
- b. ...
- c. the learned trial judge had erred in failing to direct the jury sufficiently or at all on the elements of incest and, in particular, the element of carnal knowledge.<sup>34</sup>

The relevant offence at the time of the events was section 52(1) of the *Crimes Act 1958* (Vic), which read as follows—

Whosoever unlawfully and carnally knows a woman or girl of or above the age of ten years such woman or girl being to his knowledge his daughter or other lineal descendant or his step-daughter shall be guilty of felony, and shall be liable to imprisonment for a term of not more than twenty years.

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<sup>30</sup> That is, in a legal context, a word or phrase with a specific meaning that may or may not correspond to its “ordinary” meaning: see, for example, *The Free Dictionary: Legal Dictionary* (online at 24 October 2020) “term of art” <<https://legal-dictionary.thefreedictionary.com/Term+of+Art>>.

<sup>31</sup> I do concede that, in practice, legislative drafters sometimes adopt expressions which have an existing common law meaning developed by case law. In these situations, it is probably more accurate to say that the relevant expression was chosen by the courts (not the parliament or a legislative drafter) and, although that still does not make it necessary to use the expression in legislation, there is some obvious utility in the consistency of language.

<sup>32</sup> According to one source, there are 12 distinct meanings: see *Macquarie Dictionary* (online at 24 October 2020) “knowledge”.

<sup>33</sup> [2007] VSCA 317 (19 December 2007). Maxwell P delivered a brief judgment agreeing with Neave JA.

<sup>34</sup> *Ibid* [22] (Neave JA).

In dealing with paragraph (a) of the above ground, Neave JA cited the 1844 English case of *R v Lines* as to the meaning of “unlawfully and carnally knowing a girl above the age of 10”—

If on the trial of an indictment for carnally knowing and abusing a female child under ten years old, the jury are satisfied, that at any time, any part of the virile member<sup>35</sup> of the prisoner was within the labia of the pudendum of the child, no matter how little, this is sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence.<sup>36</sup>

*R v Lines* has often been considered the common law's earliest and most authoritative explanation of the term “carnal knowledge”.<sup>37</sup> Neave JA found that “[t]he same principle necessarily applied to this offence” and that the trial judge had correctly instructed the jury that “they must be satisfied beyond reasonable doubt that: there was an act of sexual penetration, in this case by the defendant's penis into [OA's] vagina, and that penetration can be ever so slight, but there must be penetration”.<sup>38</sup> On this basis, her Honour rejected the appellant's submission with respect to paragraph (a) above.

In relation to paragraph (c) above, the appellant's submission was that the trial judge should have directed the jury on the meaning of “carnal knowledge”. However, Neave JA found that it was not necessary for the trial judge to use that specific term in his Honour's jury direction, having otherwise explained to the jury that the act of penetration could be “ever so slight”.<sup>39</sup>

Chernov JA took a similar view, as shown in the following passage—

I also agree with Neave JA that the trial judge did not err in his direction on the elements of the offence of incest. His Honour's task was to charge the jury so that it could properly carry out its obligation; he was required to direct them, *in terms that they were most likely to understand*, on so much of the law as they needed to know on the matter in issue and relate that to the facts of the case. And it is plain enough from the terms of his Honour's charge that he explained sufficiently to the jury the elements of the offence created by s 52(1) of the Crimes Act 1958 that was the subject of count 1 and what was in issue before the parties in that regard. Importantly, what his Honour relevantly said to the jury effectively explained to them what constituted “carnal knowledge” and *the mere fact that he did not, in terms, say that the sexual penetration*

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<sup>35</sup> This is another example of a euphemism.

<sup>36</sup> (1844) 174 ER 861, 861-862 (Parke B).

<sup>37</sup> See, for example, McKechnie J in *R v Melville* (2003) 27 WAR 224 at [56]:

The common law has always supplied a complete definition of “carnal knowledge” by reference to Parke B in *Regina v Joseph Lines* (1984) 1 Car & K 393; 174 ER 861.

<sup>38</sup> *R v DD* [2007] VSCA 317 at [26] (Neave J).

<sup>39</sup> *Ibid* at [46] (Neave J).

*alleged by the Crown amounted to “carnal knowledge” did not detract from the efficacy of the explanation of the elements of the offence.*<sup>40</sup>

What do we make of these judgments? Firstly, their Honours (and, for that matter, the trial judge) dealt with an archaic criminal offence in a legally sound manner. Secondly, the criminal law is unnecessarily fraught with danger when euphemistic terms in legislation must be explained to a jury in a way which does not render the verdict unsafe. A lay person may read the passage from *R v Lines* above and the former section 52(1) of the *Crimes Act 1958* (Vic) and find herself asking a very simple question: if carnal knowledge in a legal context means “penetration, however slight”, why does the legislation not simply say that? Why does it have to be “translated” for the lay person?

Note also that the former section 52(1) uses the concept of “knowledge” in two completely different ways. On the one hand, a person “knows” a woman or girl. On the other hand, he “knows” that the woman or girl is his daughter. One of these words indicates an act (or physical element), whereas the other indicates a state of mind (or mental element). The potential for this to confuse the reader, particularly the lay reader, is obvious.

Victoria was slower to remove this legal euphemism from the statute book than its ancestor. The expression was taken out of the *Offences Against the Person Act 1861* (UK) by virtue of the *Sexual Offences Act 1956* (UK), which substituted the phrase “sexual penetration”.<sup>41</sup> It was not until 1980 that Victoria moved in a similar direction. In his second reading speech for the Bill which became the *Crimes (Sexual Offences) Act 1980* (Vic), the Attorney-General Haddon Storey explained—

The Bill results from a complete review of all aspects of the law relating to sexual offences in Victoria ... The law in this State concerning sexual offences has remained virtually unchanged since the last century. Many of its provisions are anachronistic, anomalous or ineffective. Much of its language is archaic or outmoded.<sup>42</sup>

In one of the more eloquent and considered contributions to the debate that followed, the Shadow Attorney-General John Cain largely agreed.<sup>43</sup> Most of the debate on the Bill actually focused on the Bill's proposal to decriminalise homosexuality in Victoria and, to a lesser extent, change the law on incest and soliciting for prostitution.

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<sup>40</sup> Ibid at [5] (Chernov JA) (emphasis added).

<sup>41</sup> See especially *Sexual Offences Act 1956* (UK) s 44, which defined sexual penetration.

<sup>42</sup> Victoria, *Parliamentary Debates*, Legislative Council, 18 November 1980, 2869 (Haddon Storey MLC).

<sup>43</sup> Mr Cain noted that “[t]he existing law is based on a mixture of religious beliefs, ancient taboos, prejudice, authoritarianism and, to some extent, ignorance.” See Victoria, *Parliamentary Debates*, Legislative Assembly, 11 December 1980, 5010 (John Cain MLA). Mr Cain later became the 41st Premier of Victoria and held that office from April 1982 to August 1990.

The *Crimes (Sexual Offences) Act 1980* (Vic) repealed the former section 70 of the *Crimes Act 1958* (Vic) and inserted new interpretive provisions for the substituted term “sexual penetration”—

- (2) For the purposes of this Act, an act of sexual penetration is—
  - (a) the introduction (to any extent) of the penis of a person into the vagina, anus or mouth of another person of either sex, whether or not there is emission of semen; or
  - (b) the introduction (to any extent) of an object (not being part of the body) manipulated by a person of either sex into the vagina or anus of another person of either sex, otherwise than as part of some generally accepted medical treatment.
- (3) For the purposes of this Act, both—
  - (a) a person who introduces his penis or an object into the vagina, anus or mouth of another person; and
  - (b) the other person—shall be deemed to take part in an act of sexual penetration.<sup>44</sup>

These new provisions framed the replacement section 52(1) of the *Crimes Act 1958* (Vic)—

A person who takes part in an act of sexual penetration with a person who is of or above the age of ten years and whom he knows to be his child or other lineal descendant or his step-child is guilty of an indictable offence and liable to imprisonment for a term of not more than twenty years.

The terminology introduced by these amendments, and the more detailed explanation of the elements of the offence, were a welcome change in the expression of Victorian law.<sup>45</sup>

### Elsewhere in Australia

Putting aside legislative provisions which preserve the recognition of historical convictions,<sup>46</sup> most of Australia’s jurisdictions have now ended use of the expression “carnal knowledge”.<sup>47</sup>

In New South Wales, for example, the last substantive provisions of the *Crimes Act 1900* (NSW) which used the term carnal knowledge (other than for savings or transitional

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<sup>44</sup> *Crimes (Sexual Offences) Act 1980* (Vic) s 4(d), which inserted new s 2A(2) and (3).

<sup>45</sup> To clarify, although judgment in *R v DD* was delivered long after passage of the *Crimes (Sexual Offences) Act 1980* (Vic), that case related to events between October 1972 and September 1975 and the amendments did not apply retrospectively.

<sup>46</sup> See, for example, *Sentencing Act 1991* (Vic) Sch 1 cl 1(d).

<sup>47</sup> For a comprehensive overview of sexual offence legislation in Australia from European colonisation until the early 21st century, see: Hayley Boxall, Adam M Tomison and Shann Hulme, *Historical review of sexual offence and child sexual abuse legislation in Australia: 1788-2013* (Report prepared by the Australian Institute of Criminology for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2014).

purposes) were amended by the *Crimes Amendment (Sexual Offences) Act 2003* (NSW).<sup>48</sup> In his second reading speech for the Bill which became that Act, the Attorney-General Bob Debus noted that “[t]he bill will remove the anachronistic term “carnal knowledge” and utilise the term “sexual intercourse”, which is consistent with the modern language of the Act.”<sup>49</sup> Some years earlier, the Australian Capital Territory had already amended the *Crimes Act 1900* (NSW), in its application to the Territory, to replace “carnal knowledge” with “sexual intercourse”.<sup>50</sup> The explanatory statement for the relevant amending Ordinance noted that its objects were, among other things, “the restating of sexual offences in a more contemporary and relevant manner”.<sup>51</sup>

Queensland, by contrast, continues to use the expression and this has even attracted recent media attention.<sup>52</sup> Section 6 of the *Criminal Code Act 1899* (Qld) gives the following interpretive provisions—

- (1) If *carnal knowledge* is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent.
- (2) *Carnal knowledge* includes anal intercourse.

Casting our minds back to the original section 70 of the *Crimes Act 1958* (Vic), the current Queensland definition is strikingly similar in that it frames the expression in terms of when carnal knowledge is “complete”. By my count (and at the time of writing), 8 separate sections of the *Criminal Code Act 1899* (Qld) rely on or otherwise use the concept of carnal knowledge.<sup>53</sup>

### Euphemisms and dysphemisms for disability and illness

As the terminology of sexual offences began to evolve in the mid to late 20th century, a shift also occurred in the language used to refer to disability and illness in legislation. This appears to be at least partly due to a growing apprehensiveness about the way we talk about others who are disadvantaged or oppressed,<sup>54</sup> but also a deeper change in the way we think about disability and illness to relation to a person.

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<sup>48</sup> See Sch 1, items 5, 7, 8, 12, 15.

<sup>49</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 374 (Bob Debus MP).

<sup>50</sup> *Crimes (Amendment) Ordinance (No. 5) 1985* (ACT) ss 4 and 7. After self-government was introduced for the Australian Capital Territory by the *Australian Capital Territory (Self-Government) Act 1988* (Cth), most Ordinances that had applied in the Territory before self-government were converted to Acts.

<sup>51</sup> Explanatory Statement, *Crimes (Amendment) Ordinance (No. 5) 1985* (ACT) 1.

<sup>52</sup> Lexy Hamilton-Smith, “Queensland carnal knowledge laws labelled “archaic” by legal reform expert after teacher acquitted”, *ABC News* (online, 24 June 2019) <<https://www.abc.net.au/news/2019-06-24/queensland-laws-on-teacher-student-sex/11229092>>.

<sup>53</sup> *Criminal Code Act 1899* (Qld) ss 211, 215, 216, 217, 221, 222, 349, 578.

<sup>54</sup> Burridge, above n. 13 at 452, 452.

Joanna Nowak-Michalska recently completed an excellent analysis of the use of euphemisms for people with disabilities in Polish and Spanish law. She found that the linguistic shift evident in those jurisdictions was based on two key developments: a change in the model of perception of people with disabilities, from a “medical model” to a “social model”, and a move from “identity-first” language to “person-first” language.<sup>55</sup> Identity-first language is used when the word which denotes disability comes first (i.e. before mention of the person), whereas person-first language places the disability descriptor after mention of the person, often as a prepositional phrase. A simple example would be referring to someone as “an autistic person” or, alternatively, as “a person with autism”.

As Nowak-Michalska explains, the most common words to denote people with disabilities in Spanish law in the early 20th century were *anormal* (abnormal), *deficiente* (deficient or defective) and *subnormal* (subnormal), usually in situations of intellectual (as opposed to physical) disability.<sup>56</sup> Sometimes blunter words were also used, including *cretino* (“cretin”), *idiota* (idiot) and *imbécil* (imbecile).<sup>57</sup> If these terms were considered relatively neutral or euphemistic in their time, that is clearly no longer the case. In the early 21st century, the terms *discapacidad* (disability) and *personas discapacitadas* (disabled persons) became more common, and before long the Law on the Promotion of Personal Autonomy and Care for People in the Situation of Dependency mandated the use of *persona(s) con discapacidad* (person(s) with a disability).<sup>58</sup> These changes are a good example of a shift from identity-first to person-first language and, through these changes, Spanish law has come to recognise people with disabilities as, first and foremost, persons, instead of reducing them to their living condition. Even as a simple change in wording, this may have a profound social impact.

We have seen similar developments in the common law world too. As a conspicuous starting point, consider the following definition from the *Mental Deficiency Act 1958* (Vic)—

Defective" means a person belonging to any of the following classes of persons:

- (a) Imbeciles—that is to say persons in whose case there exists mental defectiveness which is so pronounced that they are incapable of managing themselves or their affairs or, in the case of children, of being taught to do so;

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<sup>55</sup> Joanna Nowak-Michalska, “The Dynamics of Euphemism in Legal Language: An Analysis of Legal Terms Referring to People with Disabilities Used in Poland and Spain” (2020) *International Journal for the Semiotics of Law* <<https://doi.org/10.1007/s11196-020-09699-5>>.

<sup>56</sup> *Ibid.* (under the section titled “Terms Referring to Persons with disabilities in Spanish Legal Acts: A Historical Overview”).

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ley 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia* [Law 39/2006 of 14 December on the Promotion of Personal Autonomy and Care for People in a Situation of Dependency] (Spain) 14 December 2006 add art 8.

- (b) Feeble-minded persons—that is to say persons not less than sixteen years of age in whose case there exists mental defectiveness which though not amounting to imbecility is yet so pronounced that they require care supervision and control for their own protection or for the protection of others;
- (c) Moral defectives—that is to say persons not less than sixteen years of age in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities, and who require care supervision and control for their own protection or for the protection of others;<sup>59</sup>

The term “defective”, when referring to a person as opposed to, say, a machine, is clearly a dysphemism by today's standards. But that was the language of the times and it was certainly not unique to Victoria.<sup>60</sup> The *Mental Deficiency Act 1958* (Vic) was subsequently repealed by the *Mental Health Act 1959* (Vic).<sup>61</sup> Although the definition of “defective” was not retained by the latter, a definition of “intellectually defective” was included and this expression was used throughout.<sup>62</sup> The parliamentary record suggests that use of this term was not a point of controversy.<sup>63</sup> The *Mental Health Act 1959* (Vic) was in turn repealed and replaced by the *Mental Health Act 1986* (Vic).<sup>64</sup> Except for provisions relating to errors in documents,<sup>65</sup> the *Mental Health Act 1986* (Vic) did not use the term “defective”. That same year, the *Intellectually Disabled Persons' Services Act 1986* (Vic) was also enacted. This Act contained the following definition—

**"Intellectual disability"** in relation to a person over the age of 5 years means a significant sub-average general intellectual functioning existing concurrently with deficits in adaptive behaviour and manifested during the developmental period.<sup>66</sup>

This definition facilitated use of the expression “intellectually disabled person” (or persons) throughout the Act.<sup>67</sup> The explanatory memorandum for the Bill, as it was introduced, provides helpful insight into the motivations behind the Bill—

This Bill, together with the companion Mental Health Bill, breaks the nexus between mental illness and intellectual disability which has existed in Victorian legislation for many years.

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<sup>59</sup> S 3(1).

<sup>60</sup> See, for example, *Mental Deficiency Act 1920* (Tas) s 5 (“Definition of defectives”), as enacted; *Mental Defectives Act 1935* (SA) s 4 (definition of “mentally defective person”).

<sup>61</sup> *Mental Health Act 1959* (Vic) sch 1 s 2, as enacted.

<sup>62</sup> See generally *Mental Health Act 1959* (Vic) Part II, as enacted.

<sup>63</sup> See generally Victoria, *Parliamentary Debates*, Legislative Council, 17 November 1959, 1264-1268 and 3 December, 1915-1925 and 1930-1939.

<sup>64</sup> *Mental Health Act 1986* (Vic) sch 6, as enacted.

<sup>65</sup> *Mental Health Act 1986* (Vic) s 121 (Amendment of documents), as enacted.

<sup>66</sup> *Intellectually Disabled Persons' Services Act 1986* (Vic) s 3, as enacted.

<sup>67</sup> See, for example, *Intellectually Disabled Persons' Services Act 1986* (Vic) s 5 (Statement of principles), as enacted.

The Bill recognizes that intellectually disabled people have the same rights and needs as other citizens.

It expresses clear principles on which the delivery of support services to the intellectually disabled are to be based, seeks to assist and encourage intellectually disabled people to achieve their maximum potential, and aims at promoting and fostering greater participation and involvement of intellectually disabled people in the life of the community.<sup>68</sup>

Even though the Bill (and later the Act) maintained a form of identity-first language, these comments provide evidence that the thinking behind the new legislative scheme had already shifted in the direction of a person-first model. The *Intellectually Disabled Persons' Services Act 1986* (Vic) was eventually repealed by the *Disability Act 2006* (Vic),<sup>69</sup> which continues in operation today. This Act took the next quantum leap towards person-first language. Rather than speaking of intellectually disabled persons, Victorian law now speaks of “persons with an intellectual disability”. The relevant definition is—

*intellectual disability*, in relation to a person over the age of 5 years, means the concurrent existence of—

- (a) significant sub-average general intellectual functioning; and
  - (b) significant deficits in adaptive behaviour—
- each of which became manifest before the age of 18 years;

The Act similarly echoes the principle from 1986 that persons with a disability have the same rights as others in the community<sup>70</sup> and also contains specific principles which apply in relation to persons with an intellectual disability.<sup>71</sup> A person-first understanding of disability is likewise reflected in the second reading speech delivered by then Minister for Community Services, Sherryl Garbutt—

International human rights standards and the increasing promotion and protection of the human rights of people with a disability has resulted in significant changes in the understanding of disability.

...

Legislation is important for many reasons. It provides the framework for a just and civil society. It incorporates the values that are important to that society, and changes to legislation over time are equally important because they recognise and reflect social change.

...

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<sup>68</sup> Explanatory Memorandum, *Intellectually Disabled Persons' Services Bill 1986* (Vic), 1.

<sup>69</sup> *Disability Act 2006* (Vic) s 222(1), as enacted.

<sup>70</sup> *Ibid.*, s 5(1).

<sup>71</sup> *Ibid.*, s 6(1).

[The *Intellectually Disabled Persons' Services Act 1986* (Vic) and the *Disability Services Act 1991* (Vic)] were both introduced more than a decade ago. Since that time, there have been many changes and advances in a number of areas. Some of these include changes in community attitudes and expectations ...<sup>72</sup>

We can expect further changes in the way we speak of and write about people with disabilities, in legislation and in daily life. After all, the United Nations Convention on the Rights of Persons with Disabilities, to which Australia is a signatory, recognises that “disability is an evolving concept”.<sup>73</sup>

How is this evolution in language about disability relevant to our discussion of euphemisms? As noted above, the English-speaking world has, in the second half of the 20th century, become more cautious and considered in its use of language about social groups perceived to be disadvantaged or oppressed (and this is what critics often label “political correctness”).<sup>74</sup> At the same time, we have arguably become *less* cautious and *more* descriptive in the way we speak of and write about sexual relations, at least in a legal context. The former development occurred to show an equal level of respect for people with disabilities. The latter development occurred to ensure that the law expresses sexual offences accurately and in terms that lay people can comprehend. Whether or not a person is a “defective” is neither here nor there. We now appreciate that it is simply unnecessary to call a person that term (and, in a modern context, very rude). On the other hand, whether a person has committed a specific act and may be liable to criminal punishment is critically important for a court to determine. Modern legislation must recognise both of these things.

So, is “person with a disability” a euphemism for “defective”? I would say that the answer is no. The former expression is clearly less harsh, but it is still entirely accurate and it does not obfuscate the meaning; nor does it truly fit into any of Burridge's categories of euphemisms (see above). I would say that it is an appropriately orthophemistic, plain English expression. But that is only my view. Perhaps a “straight-talking” person may argue that using four words instead of one is itself a problem. As for the question of whether “carnal knowledge” is a euphemism for “sexual penetration”, the answer is still a resounding yes.

## **Conclusion**

Rather than restating or summarising everything I have already said, I will borrow a quote from Paul Salembier, who perhaps made the same point more succinctly than I have—

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<sup>72</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 1 March 2006, 1284.

<sup>73</sup> *United Nations Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN Doc A/RES/61/106 (24 January 2007, adopted 13 December 2006) Preamble para (e).

<sup>74</sup> Burridge, above n. 13 at 452, 452.

Resorting to euphemisms ... naturally runs contrary to the drafter's prime directive of precision and clarity, and drafters should therefore be wary of attempts to introduce them into legislative or legal documents.<sup>75</sup>

If a drafter follows this approach, it does not preclude the use of euphemisms in legislation entirely, but it does regulate their use appropriately. Finally, we must all remind ourselves that none of the expressions that we use to communicate about complex or uncomfortable topics in the law is immutable. There is no perfect wording in legislation and language will always be subjective. But that is what makes drafting legislation an art, not just a skill.

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<sup>75</sup> Paul Salembier, *Legal and Legislative Drafting* (LexisNexis, 2nd ed, 2018) 127.

# Legislative Drafting in Statutory Interpretation: A Plea for Recognition

Gabriela Dedelli<sup>1</sup>



## Abstract

*This article examines how knowledge of drafting conventions and realities can enhance statutory interpretation. Information about how legislative counsel draft legislation and realities they face is more readily available now than ever. Despite this, Canadian courts have seldom drawn on drafting conventions when interpreting legislation while simultaneously relying on principles of interpretation that do not necessarily reflect drafting realities. This article argues that understanding drafting conventions and realities can enhance statutory interpretation by better enabling interpreters to derive meaning from the text and style of legislation, as well as encouraging them to think critically about the applicability of long-standing interpretive principles. It also highlights the need for more education on drafting conventions and realities in law schools to develop new generations of interpreters who are better equipped to uncover the intended meaning of legislation.*

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## Introduction

When you read text, you think about what the writer meant. You think about why the writer chose certain words or used a certain structure. You think about why the writer mentioned something in one part of the work instead of another. These questions are part of the natural process of interpretation. When it comes to legislation, more resources are available than ever to help readers seeking to understand its meaning (referred to as “interpreters” throughout this article) answer these questions. Drafting guides are readily available online, legislative counsel are openly sharing their practices and struggles, and academics are shedding light on the creation of legislation. However, despite the increased availability of information, Canadian courts are largely ignoring these resources in statutory interpretation.

This article examines how knowledge of drafting conventions and drafting realities can enhance statutory interpretation. Part 1 examines the current use of drafting conventions in Canadian law, with an emphasis on the use of publicly available drafting guides. Part 2 establishes the rationale for why drafting conventions should be considered in statutory interpretation and examines how these conventions can help interpreters draw meaning from the words and structure of legislation to improve interpretation. Part 3 analyses the usefulness of commonly relied on interpretive rules in the face of the operational realities of legislative drafting and suggests that these rules should be less heavily relied on. Finally, Part 4 proposes the need for more education regarding drafting conventions and realities in law schools to develop new generations of interpreters who are better equipped to interpret legislation.

### Part 1: Drafting conventions are seldom referenced in Canadian case law

In recent years there have been increased efforts to shed light on the way legislation is developed in Canada. These efforts include the publication of drafting guides that illuminate the processes and conventions used in developing legislation. The most comprehensive of these drafting guides is the *Uniform Drafting Conventions*, published by the Uniform Law

Conference of Canada.<sup>2</sup> The *Uniform Drafting Conventions* were first adopted in 1919 and provide a number of rules, primarily related to form, for the development of legislation across Canada.<sup>3</sup> The *Uniform Drafting Conventions* have been endorsed by Ruth Sullivan in her texts on statutory interpretation as aids to interpreting legislation.

Additional drafting guides have been published and made readily available by various Canadian jurisdictions. The federal government published *Legistics* in 2000, which provides guidance on various drafting issues and makes recommendations about how to construct legislation.<sup>4</sup> *Legistics* includes information about how certain ideas should be expressed in legislation, how sentences and paragraphs should be built, and how certain punctuation should be used. The Office of the Legislative Counsel in British Columbia published its guide to legislation and drafting, *A Guide to Legislation and Legislative Process in British Columbia (BC Legislation Guide)*, in 2013.<sup>5</sup> The *Guide* is comprised of five Parts, one of which details the province's drafting practices. This Part includes conventions for word use, as well as commentary on how to structure and organize legislation.<sup>6</sup> However, the *Guide* is not as detailed as *Legistics*. Other provinces have also published reports detailing their legislative processes; however, these guides do not provide details about drafting conventions.<sup>7</sup> This article will focus on the *Uniform Drafting Conventions*, *Legistics*, and the *BC Legislation Guide* because of their depth and general availability.

Although the drafting guides mentioned above exist and are available for use by lawyers and judges in arguing statutory interpretation cases and resolving questions of statutory interpretation respectively, they have rarely been cited in case law. The *Uniform Drafting Conventions* have received the most attention of the three sets of conventions, having been referred to by the Supreme Court of Canada (SCC), the Federal Court (FC), and Ontario courts.<sup>8</sup> This is likely because the *Uniform Drafting Conventions* have been featured in Ruth Sullivan's texts on statutory interpretation, which are widely relied on by Canadian courts. The *Uniform Drafting Conventions* have also been referenced at the tribunal level in Nova

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<sup>2</sup> Uniform Law Conference of Canada, "Report of the Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada" (last visited 21 April 2020), online: [www.ulcc.ca/en/uniform-acts-en-gb-1/546-drafting-conventions/66-drafting-conventions-act](http://www.ulcc.ca/en/uniform-acts-en-gb-1/546-drafting-conventions/66-drafting-conventions-act) [*Uniform Drafting Conventions*].

<sup>3</sup> *Ibid.*

<sup>4</sup> Department of Justice Canada, "Legistics" (last modified 12 May 2020), online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/toc-tdm.html> [*Legistics*].

<sup>5</sup> British Columbia, Ministry of Justice, *A Guide to Legislation and Legislative Process in British Columbia (Guide)* (British Columbia: Ministry of Justice, 01 August 2013), online: [https://www.crownpub.bc.ca/Product/Details/7665005851\\_S](https://www.crownpub.bc.ca/Product/Details/7665005851_S) [*BC Legislation Guide*].

<sup>6</sup> *BC Legislation Guide*, *ibid* at Part 2: *Drafting Principles*.

<sup>7</sup> See, for example, Alberta Justice, *A Guide to the Legislative Process - Acts and Regulations (Guide)* (Alberta: Alberta Justice, July 2005); and Ontario, Ministry of the Attorney General, *Policy Development Process in Ontario* (Ontario: Ministry of the Attorney General).

<sup>8</sup> The *Uniform Drafting Conventions* have been referenced once by each of the Supreme Court of Canada, the Federal Court, the Ontario Court of Appeal, and the Ontario Superior Court (citing the Ontario Court of Appeal decision). These cases are discussed in Part II.

Scotia.<sup>9</sup> *Legistics*, on the other hand, has only been mentioned twice in Canadian case law—once by the British Columbia Court of Appeal (BCCA) and once by the Ontario Landlord Tenant Board (ON LTB).<sup>10</sup> The *BC Legislation Guide* has not been referred to at all.

The handful of references mentioned above pale in comparison to the thousands of published cases dealing with statutory interpretation. A general search of statutory interpretation cases in CanLII yields over 15,000 results. An argument can be made that, although the drafting guides above have not received explicit attention in case law, generally known drafting conventions are frequently used in statutory interpretation cases. However, a search of case law discussing “drafting conventions” in legal databases yields only 100-150 cases. Again, this pales in comparison to the thousands of statutory interpretation cases that exist.

Overall, examining both explicit and abstract references to drafting conventions in Canadian case law demonstrates that drafting conventions are not being used in statutory interpretation with any great frequency. Despite the logical connection between drafting and interpreting legislation, the scan of case law above suggests that interpreters are overlooking useful resources that could help them understand the meaning of legislation by shedding light on how and why the legislation was created as it was.

## Part 2: The case for using drafting conventions in statutory interpretation

Although the dominant approach for statutory interpretation in Canada is contextual, the text of the legislation carries significant weight. The modern principle of statutory interpretation is that, “the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament”.<sup>11</sup> This rule has been widely adopted by the SCC following *Rizzo & Rizzo Shoes Ltd (Re)*, and it has defined statutory interpretation across Canada. The modern principle suggests that the purpose of statutory interpretation is to uncover and give effect to the legislature’s intention in enacting a law in order to uncover the meaning of the legislation.<sup>12</sup> However, the meaning of legislation cannot be uncovered without analysing the text of the legislation itself.

Statutory interpretation begins with the text. Professor Sullivan recommends an approach to interpretation that first considers the words of a provision in their immediate context.<sup>13</sup> The immediate context refers to as much of the surrounding text as required to make sense of the

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<sup>9</sup> The *Uniform Drafting Conventions* have been referred to in 11 decisions of the Nova Scotia Utility and Review Board.

<sup>10</sup> These cases are discussed in Part II.

<sup>11</sup> *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193.

<sup>12</sup> Susan Baker & Erica Anderson, *Researching Legislative Intent* (Toronto: Irwin Law, 2019) at 9.

<sup>13</sup> Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 49.

words in question, including the section and subsection where the words appear.<sup>14</sup> Reading the words in their immediate context allows an interpreter to arrive at a first impression meaning, which is then tested against the larger context to either resolve or uncover ambiguity.<sup>15</sup>

The larger context is vast and includes the legislative context, the legal context, and the external context.<sup>16</sup> The legal and external contexts go beyond the legislation itself and include external sources of law, as well as the factual and ideological setting of the legislation.<sup>17</sup> The legislative context focuses on the legislation itself. The legislative context includes the whole statute, the legislature's statute book, and relevant legislation from other jurisdictions.<sup>18</sup> Throughout this interpretive analysis, the text and style of legislation remain important considerations.

Moreover, the SCC has expressed that certain presumptions associated with the legal and external contexts cannot be used in the absence of genuine ambiguity, which places even greater importance on the legislation itself. For example, in *Bell ExpressVu Limited Partnership v Rex*, the SCC stated that presumptions about the strict construction of penal statutes and conformity with the *Canadian Charter of Rights and Freedoms* can only be applied where a real ambiguity exists.<sup>19</sup> The SCC explained that a "real ambiguity" exists when the words of a provision are "reasonably capable of more than one meaning".<sup>20</sup> This ambiguity threshold exists for the use of a number of other interpretive principles, such as the principle that statutes relating to Indigenous peoples should be construed liberally and the presumption of conformity with international law.<sup>21</sup>

Analyzing the text, the immediate context of a provision, and the greater legislative context to derive meaningful information about the legislature's intent requires an understanding of how legislation is drafted. It requires an understanding of why certain words are used, how provisions are put together, and how legislation is generally organized. These are all functions of drafting and these important decisions are made by legislative counsel and drafting offices.

Legislative counsel and drafting offices play critical roles in the development of legislation. At an individual level, legislative counsel are responsible for ensuring that government

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid*; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 10.

<sup>16</sup> *Ibid* at 51.

<sup>17</sup> *Ibid* at 52.

<sup>18</sup> *Ibid* at 51.

<sup>19</sup> *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 28.

<sup>20</sup> *Ibid* at para 29.

<sup>21</sup> Sullivan, *above note 13* at 255, 314.

policy is effectively expressed in legislation.<sup>22</sup> They find ways to understandably convey the intentions of policy makers and ensure that legislation is readable.<sup>23</sup> They uncover and dispel ambiguity.<sup>24</sup> At a collective level, drafting offices develop standards, policies, and procedures to bring coherence and consistency to the legislative system.<sup>25</sup> In addition, drafting offices consolidate and revise legislation to improve readability.<sup>26</sup> In short, as the drafters of legislation, legislative counsel and drafting offices are intimately involved in communicating the legislature's intent. Therefore, it is difficult to draw meaningful statutory interpretations without understanding how legislative counsel do their jobs and what rules they apply in designing legislation. This is especially true given the current state of statutory interpretation, which emphasizes the text and the meaning it derives from surrounding provisions, the legislative enactment as a whole, and a legislature's statute book.

An argument can be made that understanding drafting conventions when interpreting legislation is unnecessary because legislative counsel normally rely on ordinary meaning and legislation is written in ordinary language. However, this argument disregards the fact that legislation is a specific type of writing with its own style. Academics and courts alike have acknowledged that legislation is its own literary genre, drafted to convey meaning in a particular way.<sup>27</sup> The British Columbia Court of Appeal has recently stated:

Legislation is not written like other texts; it conveys meaning in a particular way. Those who search for symbolism or narrative search in vain. The legislator instead follows conventions specific to legislation in order to explicitly and implicitly tell the reader what the law is.<sup>28</sup>

Therefore, as its own literary genre, legislation has unique characteristics. It contains various elements, such as sections and subsections, that do not appear in other forms of writing. It follows certain rules, like avoiding metaphors, irony, wit, embellishment, colloquialism, and rhetorical devices, that other types of writing do not.<sup>29</sup> Accordingly, just as a reader needs to understand the stylistic conventions of poetry to properly understand the meaning of a poem, so too does an interpreter need to understand legislative drafting conventions to properly understand the meaning of legislation.

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<sup>22</sup> John Mark Keyes & Katharine MacCormick, "Roles of Legislative Drafting Offices and Drafters" (Paper delivered at the Canadian Institute for the Administration of Justice, September 2002) at 11.

<sup>23</sup> *Ibid* at 17.

<sup>24</sup> *Ibid* at 16.

<sup>25</sup> *Ibid* at 8.

<sup>26</sup> *Ibid* at 9.

<sup>27</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) at §8.1-§8.3.

<sup>28</sup> *Evans v New Westminster (Police Department)*, 2019 BCCA 317 at para 28 [*Evans*].

<sup>29</sup> Sullivan, *above note* 13 at 22.

### **Drafting conventions help clarify the meaning of common language used in legislation**

A review of the way that courts and tribunals have used drafting guides like the *Uniform Drafting Conventions* and *Legistics* demonstrates how useful drafting conventions can be in identifying and resolving ambiguity in statutory interpretation.

Drafting conventions have been helpful in determining the scope of what is included by certain terms. For example, in the only SCC decision that discusses the *Uniform Drafting Conventions*, the SCC used the *Conventions* to dispel ambiguity about the meaning of “owner” in the *Civil Air Navigation Services Commercialization Act (CANSCA)*. In *Canada 3000 Inc, Re; Inter-Canadian (1991) Inc (Trustee of)*, the SCC relied on section 21(4) of the *Uniform Drafting Conventions* to support the conclusion that the meaning of “owner” in section 55 of the *CANSCA* was limited to the four examples provided in the legislation even though the examples were introduced by “includes” rather than “means”.<sup>30</sup> The Court relied on the fact that, although the English version of the *CANSCA* used the word “includes”, the French version used “s’entend”.<sup>31</sup> As section 21(4) of the *Uniform Drafting Conventions* states, “s’entend” is equivalent to “means”, which signifies an exhaustive definition.<sup>32</sup> The SCC relied on this, the shared meaning rule, and evidence of the legislature’s intent, to support its determination.<sup>33</sup>

The *Uniform Drafting Conventions* were similarly used by the Ontario Court of Appeal (ONCA) in *Macartney v Warner*.<sup>34</sup> In this case, Justice Morden, in his concurring opinion, relied on the *Uniform Drafting Conventions* to determine that the examples of recoverable damages under section 61(2) of the *Family Law Act (FLA)* were not exhaustive.<sup>35</sup> Section 61(2) of the *FLA* used “includes” rather than “means” when detailing the damages that could be claimed. As such, Justice Morden found that the list of damages in the provision was not exhaustive because “includes” is generally used to provide examples of a term’s meaning without being all-inclusive.<sup>36</sup>

At the tribunal level, the Nova Scotia Utility and Review Board (NSUARB) has also used the *Uniform Drafting Conventions* to determine the scope of words. Eleven decisions of the NSUARB reference the *Uniform Drafting Conventions*, and all of them use the *Conventions* in the same way.<sup>37</sup> All of the decisions discussed the use of “includes” and “means” when

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<sup>30</sup> *Canada 3000 Inc, Re; Inter-Canadian (1991) Inc (Trustee of)*, 2006 SCC 24 at paras 46-49 [*Canada 3000*].

<sup>31</sup> *Ibid.*

<sup>32</sup> *Uniform Drafting Conventions*, above note 2, s 21(4).

<sup>33</sup> *Canada 3000*, above note 30 at paras 49-53.

<sup>34</sup> *Macartney v Warner* (2000), 46 OR (3d) 641, 183 DLR (4th) 345 [*Macartney*].

<sup>35</sup> *Ibid* at paras 81-82.

<sup>36</sup> *Ibid* at para 81; *Uniform Drafting Conventions*, above note 2, s 21(4).

<sup>37</sup> See: *Richardson v Wolfville (Town)*, 2000 NSUARB 76; *Maxwell v Kentville (Town)*, 2002 NSUARB 63; *Nova Scotia (Director of assessment) v Ocean Produce International Ltd*, 2002 NSUARB 10; *Fox (Re)*, 2007

defining terms, as section 21(4) of the *Conventions* states. For example, in *Richardson v Wolfville (Town)*, the NSUARB found that meaning of “aggrieved person” in section 191(a) of the *Municipal Government Act* was not limited to the examples provided in the legislation because, according to section 21(4) of the *Uniform Drafting Conventions*, the use of “includes” in a definition signifies that the definition is not exhaustive.<sup>38</sup> The same logic was used in *Nova Scotia (Director of assessment) v Ocean Produce International Ltd* to determine that the definition of “farm property” in section 2 of the *Assessment Act* was exhaustive, given that it contained the word “means”.<sup>39</sup>

Overall, the examples above demonstrate the useful role that drafting conventions can play in understanding terminology and syntactical constructions frequently used in legislation. Although a question can be raised as to how important the drafting conventions were in the cases above given that the dictionary definitions of “means” and “includes” are exhaustive and non-exhaustive respectively, the decision makers in most of the cases above relied almost exclusively on the drafting conventions to reach their conclusions. This suggests that, while there may be other tools available to assist in interpreting legislative terminology, drafting conventions still hold value. Further, although existing decisions have only relied on drafting conventions to interpret “includes” and “means”, drafting guides provide information about the use of many other terms commonly found in legislation. For example, *Legistics* provides commentary on the use of “and”, “or”, “must”, “may”, “shall”, “such”, and more.<sup>40</sup> Drafting conventions could prove more valuable in helping interpreters resolve questions arising from the use of these frequently contested terms.

### ***Drafting conventions help clarify what the form of legislation implies***

The *Uniform Drafting Conventions* and *Legistics* have also been used to draw conclusions from the structure and form of legislation. They have been used to understand the significance of a provision being in one part of a statute instead of another, the importance of a word’s tense, and the implications of structural elements like paragraphs. In *Hrushka v Canada (Foreign Affairs)*, the Federal Court used the *Uniform Drafting Conventions’* commentary on definitions to interpret Passport Canada’s scope of authority pursuant to the *Canadian Passport Order*.<sup>41</sup> The Court held that Passport Canada did not have the authority to withhold passport services pursuant section 2 of the *Order*, which was the definitions

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NSUARB 12; *Whitcombe, Re*, 2005 NSUARB 63; *Dolliver v Shelburne (Town Council of)*, 2001 NSUARB 68; *D & M Lightfoot Farms Ltd, Re*, 2005 NSUARB 117; *Eco Awareness Society (Re)*, 2010 NSUARB 102; *Dartmouth Crossing Limited (Re)*, 2015 NSUARB 48; *Lunenburg Heritage Society (Re)*, 2010 NSUARB 224; and *Peninsula South Community Association v Chebucto Community Council (Halifax Regional Municipality)*, 2002 NSUARB 7.

<sup>38</sup> *Richardson v Wolfville (Town)*, 2000 NSUARB 76 at paras 26-27.

<sup>39</sup> *Nova Scotia (Director of assessment) v Ocean Produce International Ltd*, 2002 NSUARB 10 at para 29.

<sup>40</sup> *Legistics*, above note 4.

<sup>41</sup> *Hrushka v Canada (Foreign Affairs)*, 2009 FC 69 [*Hrushka*].

section.<sup>42</sup> That section stated that "'Passport Canada" means a section of the Department of Foreign Affairs and International Trade, wherever located, that has been charged by the Minister with the issuing, refusing, revoking, withholding, recovery, and use of passports."<sup>43</sup> Foreign Affairs Canada argued that the authority to withhold passport services flowed naturally from Passport Canada's ability to revoke passports.<sup>44</sup> However, the Court found that section 2 could not confer powers on Passport Canada because definitions do not contain substantive content according to drafting conventions like section 21(2) of the *Uniform Drafting Conventions*.<sup>45</sup>

Moreover, the ON LTB has used *Legistics* to draw inferences from the tense used in legislation. In *TET-77648-17 (Re)*, the ON LTB used the present indicative portion of *Legistics* to support a finding that a tenant could only request an order under section 29(1) of the *Residential Tenancies Act (RTA)* for the past actions of a landlord.<sup>46</sup> *Legistics* provides that legislation should be written in the present tense, and that other tenses should only be used in subordinate clauses to express actions that take place before or after the action in the principal clause.<sup>47</sup> Section 29(1) of the *RTA* allows tenants to apply for an order from the ON LTB that a landlord "has substantially interfered with their reasonable enjoyment of their rental unit".<sup>48</sup> Given the use of past tense in section 29(1), the ON LTB found that the legislation did not allow tenants to make applications for orders based on anticipated interferences.<sup>49</sup>

Further, the BCCA has used *Legistics* to examine the use of paragraphing in the *Motor Vehicle Act*. In *Evans v New Westminster [Evans]*, the BCCA interpreted section 215(3)(b) of the *Motor Vehicle Act*, which states that<sup>50</sup>:

215 (3) A peace officer may, at any time or place on a highway or industrial road if the peace officer has reasonable grounds to believe that a driver's ability to drive a motor vehicle is affected by a drug, other than alcohol,

...

(b) serve the driver with a notice of driving prohibition, and ...

The question in *Evans* was whether a peace officer could serve a driving prohibition at a police station as opposed to a highway or industrial road. The BCCA ultimately relied on

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<sup>42</sup> *Ibid* at para 18.

<sup>43</sup> *Ibid* at para 14.

<sup>44</sup> *Ibid* at paras 16-18.

<sup>45</sup> *Ibid*.

<sup>46</sup> *TET-77648-17 (Re)*, 2017 CanLII 48811 at paras 4-5 (ON LTB) [*TET-77648-17*].

<sup>47</sup> *Legistics*, above note 4 at *Present Indicative*.

<sup>48</sup> *TET-77648-17*, above note 46 at para 4.

<sup>49</sup> *Ibid* at para 5.

<sup>50</sup> *Evans*, above note 28 at para 15.

the purpose of the legislation—to prevent driving under the influence of drugs—to interpret the provision broadly. The Court held that peace officers were not restricted to serving driving prohibitions on a highway or industrial road, which is inconsistent with the way that paragraphing is generally used in drafting.<sup>51</sup> As stated in *Legistics*, when using paragraphing, parallel units of text must be capable of being read grammatically with the opening words preceding them.<sup>52</sup> This would suggest that section 215(3)(b) of the *Motor Vehicle Act* is constrained by the limiting words “any time or place on a highway or industrial road” in section 215(3). This was the argument advanced by Mr. Evans.<sup>53</sup> Although the BCCA did not accept Mr. Evans’s interpretation after examining the public safety purpose of the legislation, his use of *Legistics* and paragraphing is instructive. His argument provides an example of how lawyers can use drafting conventions to craft arguments about what the structure of legislation, which can play an important role in informing the meaning of the words, implies.<sup>54</sup>

Overall, the cases above provide examples of the important role that drafting conventions can play in uncovering the meaning of words based on how and where the words are used in legislation. The structure and form of legislation is an important part of the context that helps clarify the meaning of the text and, as such, understanding these elements allows interpreters to elevate their interpretations.

### ***Drafting conventions can help offset overreliance on legislative purpose***

In addition to clarifying meaning, interpretive arguments based on drafting conventions can help to counterbalance overreliance on legislative purpose in statutory interpretation. While the purpose of legislation is an important consideration that must be identified and considered in every case, Canadian courts have generally rejected a purposive approach to statutory interpretation.<sup>55</sup> Under a purposive approach to interpretation, the purpose of legislation is the primary concern for an interpreter—other indicators of meaning, including the text, are subordinate.<sup>56</sup>

The SCC has indicated that the purpose of legislation does not give an interpreter *carte blanche* to disregard the words of a statute. In *University of British Columbia v Berg* [*Berg*], in the context of human rights legislation that is meant to be interpreted broadly and purposively, the SCC stated that purposive interpretation does not give a decision maker “license to ignore the words” of a statute.<sup>57</sup> More recently in *Bastien Estate v Canada*, the

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<sup>51</sup> *Ibid* at paras 32-28.

<sup>52</sup> *Legistics*, above note 4 at *Paragraphing*.

<sup>53</sup> *Evans*, above note 28 at para 30.

<sup>54</sup> Sullivan, above note 13 at 130.

<sup>55</sup> Sullivan, above note 27 at §9.3; §9.9.

<sup>56</sup> *Ibid* at §9.8.

<sup>57</sup> *Berg v University of British Columbia*, [1993] 2 SCR 353 at para 40, 102 DLR (4th) 665.

SCC affirmed the principle in *Berg* and indicated that a purposive interpretation must be rooted in the statutory text and cannot ignore that which the text expresses.<sup>58</sup> However, despite the SCC's clear guidance, Professor Sullivan notes that there are a number of Canadian cases in which courts, rather than interpreting the legislature's words in light of the legislation's purpose, have ensured that the purpose of legislation is achieved regardless of any limiting language in the text.<sup>59</sup> The BCCA in *Evans* arguably did the same in its interpretation of section 215(3)(b) of the *Motor Vehicle Act* given that the purpose of *Act* drove interpretation. In *Evans*, the Court did not appear to interpret the limiting words from section 215(3) in light of the purpose of the *Motor Vehicle Act* at all. In fact, the BCCA explicitly acknowledged that the interpretation it accepted favoured the "purpose, greater context and consequences of the provision over a strict reading of its text".<sup>60</sup> Based on the SCC's guidance above, this approach appears incorrect in that it unduly emphasized the legislation's purpose to the exclusion of the statutory text.

Overall, Mr. Evans's drafting argument in *Evans* likely should not have been so readily overridden by the purpose-based arguments in the case. The decision demonstrates the resistance of some judges to generally accepted drafting conventions, particularly when they determine that the purpose of a piece of legislation supports a meaning that the text does not. In the ordinary course of statutory interpretation, however, it is clear that the text and purpose of legislation must be considered together to derive meaning. As such, drafting conventions can help elucidate what the text expresses so that purposive interpretations do not dominate statutory interpretation. This can help to enhance the integrity of statutory interpretation and ensure that cases are consistently decided in accordance with correct interpretive principles.

### **Part 3: Commonly relied on interpretive rules do not adequately reflect drafting realities**

The previous portions of this article discussed the value of drafting conventions and their potential to improve statutory interpretation. However, a discussion of some of the most commonly used presumptions in statutory interpretation, which are based on conventions attributed to legislative counsel by the courts, is also warranted. This Part will examine the realities of drafting and argue that, in light of the operational constraints on drafters, some of the most commonly used presumptions about drafting should be less heavily relied on. This discussion is important when examining drafting conventions because conventions that are not strictly adhered to cannot be relied on with any certainty.

One of the main ways through which drafting conventions have historically informed statutory interpretation is through the rules of textual analysis. Textual analysis refers to the

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<sup>58</sup> *Bastien Estate v Canada*, 2011 SCC 38 at para 25.

<sup>59</sup> Sullivan, *above* note 27 at §9.8.

<sup>60</sup> *Evans*, *above* note 28 at para 38.

process of exploring, refining, and testing first impression interpretations by consciously examining the text and identifying the conventions and assumptions underlying logical interpretations.<sup>61</sup> Two of the most commonly relied on rules of textual analysis are the presumption of consistent expression and the presumption against tautology.

### **Consistent Expression**

The presumption of consistent expression assumes that the legislature chooses its words carefully and consistently both within a statute and across a legislature's statute book.<sup>62</sup> This means that, throughout legislation: (1) the same words have the same meaning; (2) different words have different meanings; and (3) patterns of expression are used consistently.<sup>63</sup> The presumption of consistent expression is a common interpretive rule that has been used and endorsed consistently by the SCC. For example, in *R v Zeolkowski*, the SCC stated that, "Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation".<sup>64</sup> Further, in *Agraira v Canada (Public Safety and Emergency Preparedness)*, the SCC stated that, "If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings".<sup>65</sup>

Consistent expression is discussed in drafting guides. In the *Uniform Drafting Conventions*, section 34(1) states that, "Different words should not be used to express the same meaning within a single Act".<sup>66</sup> Section 34(2) goes on to state that the same term can only be used to express different meanings where the intended meaning is perfectly clear in the context.<sup>67</sup> The *BC Legislation Guide* also refers to the presumption of consistent expression, stating that the principle constrains legislative drafting and implies that different words have different legal effects.<sup>68</sup> These conventions demonstrate that legislative counsel acknowledge the presumption of consistent expression in their work.

However, the realities of legislative drafting call into question the validity and reliability of the presumption of consistent expression. Research on legislative drafting practices in the US found that, although 93% of legislative counsel aspired to use consistent terms throughout legislation, organizational barriers made realizing this aspiration difficult.<sup>69</sup> Further, the study found that only 9% of legislative counsel often or always intended for

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<sup>61</sup> Sullivan, *above* note 13 at 129.

<sup>62</sup> Sullivan, *above* note 27 at §8.32

<sup>63</sup> Sullivan, *ibid* at §8.32-§8.39.

<sup>64</sup> *R v Zeolkowski*, [1989] 1 SCR 1378 at para 19, 61 DLR (4th) 725.

<sup>65</sup> *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81.

<sup>66</sup> *Uniform Drafting Conventions*, *above* note 2, s 34(1).

<sup>67</sup> *Ibid*, s 34(2).

<sup>68</sup> *BC Legislation Guide*, *above* note 5 at 2 in Part 2: *Drafting Principles*.

<sup>69</sup> Abbe R Cluck & Lisa Schultz Bressman, "Statutory Interpretation from the Inside -- An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I" (2013) 65:5 *Stan L Rev* 901 at 936.

terms to apply consistently across statutes covering unrelated subject matter.<sup>70</sup> This percentage makes sense given that statute books are extensive, dealing with a vast number of subjects, and developed over time. The principle of consistent expression applies most strongly across a legislature's statute book to statutes and provisions dealing with related subject matter, suggesting that courts account for the differences in how language is used in different contexts, and over time, in statutory interpretation.<sup>71</sup> Nevertheless, the US study still suggests that the principle of consistent expression, despite being commonly relied on by the courts, is not a drafting convention that legislative counsel strictly adhere to—particularly across statutes.

While the US data may not accurately reflect the practices of Canadian legislative counsel, the organizational barriers that US legislative counsel identified as preventing them from achieving consistent expression also exist in Canada. One of the major barriers to consistent expression identified in the US study was the increasing tendency to legislate through unorthodox vehicles like omnibus bills.<sup>72</sup> Omnibus bills are, simply speaking, bills designed to amend, repeal, or enact several pieces of legislation at once.<sup>73</sup> Omnibus bills have been used in Canada since 1888 and, although they are generally characterized by the compilation of separate but related initiatives, they sometimes consolidate unrelated subject matter.<sup>74</sup> The challenge with omnibus legislation is that it is long and complex, and there is often scant opportunity for review and parliamentary scrutiny.<sup>75</sup> This, understandably, increases the likelihood of inconsistencies. In the US study, 74% of legislative counsel stated that omnibus legislation was more likely to be internally inconsistent than legislation covering just one topic.<sup>76</sup>

Moreover, in Canada, legislative counsel are increasingly working with limited time and resources. Legislation in Canada is often drafted with tight deadlines and pressure on legislative counsel to get the job done as quickly as possible.<sup>77</sup> A ballpark estimate of the time required to prepare a piece of legislation at the Department of Justice has historically been between three to nine months, which is daunting given the complexity of most legislation.<sup>78</sup> Further, while the Department of Justice's Legislative Services Branch—the branch responsible for drafting federal legislation—is relatively large, employing 200 staff

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<sup>70</sup> *Ibid.*

<sup>71</sup> Sullivan, *above* note 27 at §8.32.

<sup>72</sup> Cluck & Bressman, *above* note 69 at 936.

<sup>73</sup> Baker & Anderson, *above* note 12 at 46.

<sup>74</sup> *Ibid* at 46; Adam M Dodek, "Omnibus Bills: Constitutional Constraints and Legislative Liberations" (2017) 48:1 Ottawa L Rev 1 at 9.

<sup>75</sup> Dodek, *ibid* at 13-14; Baker & Anderson, *ibid* at 46.

<sup>76</sup> Cluck & Bressman, *above* note 69 at 936.

<sup>77</sup> Keyes & MacCormick, *above* note 22 at 20.

<sup>78</sup> Jean-Charles Bélanger, "The Origins of the Legislation Section and the Federal Legislative Process in Canada" (Presentation delivered at the Faculty of Law, University of Ottawa, January 9, 2020) [unpublished].

in 2013 (of whom approximately 55% were legislative counsel), other drafting bodies are substantially smaller.<sup>79</sup> For example, as of January 2020, the House of Commons and Senate only had three and five legislative counsel on staff respectively to draft private members' legislation.<sup>80</sup> Given increases in the number of private members' legislation passing into law, any mistakes would be likely to go unnoticed in light of the lack of resources.<sup>81</sup>

Finally, the process by which legislation is developed and enacted in Canada likely contributes to inconsistencies. Large bills can be drafted by several teams of legislative counsel and pieced together, which risks their internal consistency.<sup>82</sup> Further, at the federal level in Canada, the text of bills can be substantially amended throughout the parliamentary process at the committee stage.<sup>83</sup> While government amendments are prepared, or at least reviewed by, legislative counsel, they have limited control over changes made at the committee stage given that they are seldom involved in the discussions.<sup>84</sup> Parliamentarians can change amendments in committee and adopt modifications, thus potentially introducing inconsistencies.<sup>85</sup> Overall, the realities of drafting detailed above demonstrate that there are organizational barriers likely preventing legislative counsel from attaining the ideal of consistent expression.

Although Canadian courts do not regard the presumption of consistent expression as infallible, there are relatively few examples of the presumption being rebutted. In *Bapoo v Cooperators*, the ONCA stated that the presumption in favour of consistent expression is not an inflexible rule or infallible guide to interpretation.<sup>86</sup> The Court ultimately found that the same words used in different parts of the legislation being interpreted had different meanings because of differences in context.<sup>87</sup> However, despite the fact that *Bapoo* was decided 23 years ago, the decision has not been cited frequently.<sup>88</sup> This suggests that, although the presumption in favour of consistent expression is not infallible, it is generally

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<sup>79</sup> Canada, [Department of Justice, Legislative Services Branch Evaluation Final Report](#) (Ottawa: Department of Justice, June 2013) at 7.

<sup>80</sup> Charlie Feldman and Alexandra Schorah, "Legislative Drafting at the House of Commons and the Senate" (Presentation delivered at the Faculty of Law, University of Ottawa, January 9, 2020) [unpublished].

<sup>81</sup> *Ibid.* According to Parliament of Canada data, only 9 private members' public bills passed in the 11<sup>th</sup> session of Parliament, compared to 43 in the 41<sup>st</sup> session and 21 in the 42<sup>nd</sup> session (see: Parliament of Canada, "Private Members' Public Bills Passed by Parliament" (last visited 21 April 2020 online: [Parlinfo](#)).

<sup>82</sup> Wendy Gordon, former Deputy Law Clerk and Parliamentary Counsel of the House of Commons (Canada).

<sup>83</sup> Privy Council Office, "Guide to Making Federal Acts and Regulations" (2001) at 149, online (pdf): Government of Canada <https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>.

<sup>84</sup> *Ibid* at 159, 164; Gordon, *above* note 82.

<sup>85</sup> Gordon, *above* note 82.

<sup>86</sup> *Bapoo v Co-operators General Insurance* (1997), 36 OR (3d) 616 at para 28, 154 DLR (4th) 385 [*Bapoo*].

<sup>87</sup> *Ibid.*

<sup>88</sup> *Bapoo* has been cited only 37 times according to the [Canadian Law Information Institute](#) (CanLII) website.

adhered to in Canadian case law even though there may be a disconnect between the presumption and the realities of drafting.

Overall, the current realities of legislative drafting likely undermine the presumption of consistent expression, thus impairing its usefulness. Consistent expression may be the ideal in drafting, as reflected by the *Uniform Drafting Conventions* and the *BC Legislation Guide*; however, in the absence of strict adherence to the ideal, this convention, though commonly relied on, likely warrants less weight.

### **No Tautology**

The presumption against tautology reflects the idea that the legislature does not use superfluous or meaningless words, repeat itself, or speak in vain.<sup>89</sup> This principle, like the principle of consistent expression, has been articulated and relied on frequently by the SCC. For example, in *R v Proulx*, the SCC stated that, “It is a well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage”.<sup>90</sup>

Current drafting conventions reflect the presumption against tautology. Section 2 of the *Uniform Drafting Conventions* states that a statute should be written “simply, clearly, and concisely”.<sup>91</sup> Further, section 31 states that redundancies and archaic words or phrases should be avoided.<sup>92</sup> This section recommends eliminating words that add nothing to the message.<sup>93</sup> Taken together, these sections provide guidance against surplusage. Additionally, the *BC Legislation Guide* refers to the rule against tautology. The *Guide* draws three implications from the rule that legislative counsel should keep in mind: (1) legislation should not say anything that it has already said; (2) legislation should not say anything that does not need to be said; and (3) the meaning of words that appear in one place, but not another, is different.<sup>94</sup>

As with consistent expression, the realities of drafting tend to call into question the value of the presumption against tautology in statutory interpretation. In the US, a study found that 18% of legislative counsel stated that the rule against superfluities rarely applied to their drafting, with 45% stating that it only sometimes applied.<sup>95</sup> The legislative counsel surveyed indicated that the prevailing reasons for their departure from the rule against superfluities were that: (1) legislative counsel intentionally erred on the side of redundancy

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<sup>89</sup> Sullivan, *above* note 27 at §8.23.

<sup>90</sup> *R v Proulx*, [2000] 1 SCR 61 at para 28, 182 DLR (4th) 1.

<sup>91</sup> *Uniform Drafting Conventions*, *above* note 2, s 2.

<sup>92</sup> *Ibid*, s 31.

<sup>93</sup> *Ibid*, s 31.

<sup>94</sup> *BC Legislation Guide*, *above* note 5 at 3 of Part 2: *Drafting Principles*.

<sup>95</sup> Cluck & Bressman, *above* note 69 at 934.

in legislation to ensure that they captured the intended message, and (2) legislative counsel included redundancy in statutes to adhere to their clients' political needs.<sup>96</sup>

Although the statistics from the US may not apply to Canada, the reasons for including redundancy in legislation do. Judges have acknowledged that legislation sometimes features redundancy in order to be clear and comprehensive.<sup>97</sup> For example, in *Tuteckyj v Winnipeg (City)*, the Manitoba Court of Appeal found that the use of overlapping and repetitive words in a by-law were intended to avoid loopholes and provide clarity.<sup>98</sup> Further, in *Chrysler Canada Ltd v Canada (Competition Tribunal)*, former Chief Justice McLachlin, in her dissent, stated that general phrases that may not seem to serve a purpose are commonly included in legislation to combat arguments seeking to restrict the power conferred.<sup>99</sup> However, although these cases identify exceptions to the presumption against tautology, they have rarely been cited in case law.<sup>100</sup> This suggests that, while the presumption against tautology can be rebutted, it is generally relied on.

In sum, as with consistent expression, the operational realities of legislative drafting tend to undermine the convention against redundancy and superfluities. While avoiding redundancy may be the gold standard in legislative drafting, there are legitimate reasons for its use. As such, despite its popularity, the presumption against tautology likely warrants less reliance to enhance statutory interpretation.

#### **Part 4: Education can improve understanding of drafting conventions and drafting realities to enhance statutory interpretation**

The three Parts above highlight the need for more education in drafting conventions and realities to enable legal professionals to apply legislative drafting conventions in statutory interpretation. The first two Parts identified a disconnect between the usefulness of publicly available drafting conventions in understanding the text of legislation and their current use. Part 3 identified a disconnect between the realities of drafting and common conventions attributed to drafters. Accordingly, this Part suggests that education regarding how legislation is developed is required to address these disconnects and enhance statutory interpretation.

As demonstrated in Part 2, courts can consider drafting conventions and guidelines in statutory interpretation. As such, the only barrier to using this information is the general lack of familiarity among Canadian legal professionals with legislative drafting. This problem is

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<sup>96</sup> *Ibid* at 934-935.

<sup>97</sup> Sullivan, *above* note 27 at §8.31.

<sup>98</sup> *Tuteckyj v Winnipeg (City)*, 2012 MBCA 100 at para 74.

<sup>99</sup> *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394 at para 71, 92 DLR (4th) 609.

<sup>100</sup> *Tuteckyj v Winnipeg (City)* has only been cited 3 times according to the [Canadian Law Information Institute](#) (CanLII) website, and former Chief Justice McLachlin's comments about tautology in *Chrysler Canada Ltd v Canada (Competition Tribunal)* only 4 times.

not unique to Canada. As Professor Sullivan has aptly stated, “In nearly all jurisdictions, the role of legislative drafting in the creation and administration of law receives scant attention from legal educators and the practising bar.”<sup>101</sup> In the United States, drafting manuals were only referenced three times in jurisprudence by 2010.<sup>102</sup>

To effectively integrate drafting conventions and realities in statutory interpretation, education is required across the legal profession. This starts with law schools. It goes without saying that courses related to legislation or legislative drafting are most likely to familiarize students with drafting conventions and realities. However, at least in Canada, students are also likely to be exposed to legislative drafting in statutory interpretation courses given that the leading authorities on statutory interpretation, Professor Sullivan’s texts, highlight drafting conventions as an aid to interpretation. Research suggests that most law schools in Canada incorporate some statutory interpretation in first-year courses introducing students to the legal system and public law.<sup>103</sup> While these general first-year courses likely teach the basic principles of statutory interpretation, they likely do not cover the subject matter in enough depth to teach students about drafting conventions and realities. This content is more likely to be taught in specialized upper-year courses devoted to legislative drafting and statutory interpretation, which not all Canadian law schools offer.<sup>104</sup> A review of the course offerings for every law school in Ontario highlights the inconsistent availability of specialized legislative drafting and statutory interpretation courses. In Ontario, only Queen’s University and the University of Ottawa offer courses in both statutory interpretation and legislative drafting.<sup>105</sup> Western University, Osgoode Hall Law School, and the University of Toronto offer courses in statutory interpretation; however, they do not offer courses related to legislative drafting.<sup>106</sup> The University of Windsor and Bora Laskin Faculty of Law do not offer courses in either statutory interpretation or legislative drafting.<sup>107</sup> The inconsistent availability of courses related to legislative drafting and statutory interpretation across Ontario—and Canadian—law schools highlights the need for more education in these areas.

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<sup>101</sup> Ruth Sullivan, “The Promise of Plain Language Drafting” (2001) 47 McGill LJ 97 at 99.

<sup>102</sup> BJ Ard, “Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation” (2010) 20:1 Yale LJ 185 at 187.

<sup>103</sup> John Mark Keyes, “Challenges of Teaching Legislative Interpretation in Canada: Tackling Scepticism and Triviality” (2020) 13 Journal of Parliamentary and Political Law 479 at 482-483.

<sup>104</sup> *Ibid.*

<sup>105</sup> Queen’s University Faculty of Law, “[Course Catalogue](#)” (03 August 2020, (last visited 30 January 2021)); University of Ottawa Faculty of Law- Common Law Section, 2020-2021 Course Information, “[2020-2021 Course Search engine](#)” (last visited 30 January 2021).

<sup>106</sup> Western Faculty of Law, “[Course Offerings](#)” (last visited 30 January 2021); Osgoode Hall Law School, “[Courses and Seminars](#)” (last visited 30 January 2021); University of Toronto Faculty of Law, “[Course List \(2020-2021\)](#)” (last visited 30 January 2021).

<sup>107</sup> University of Windsor Faculty of Law, “[2020-2021 Course Descriptions & Evaluation Methodology](#)” (24 November 2020, last visited 30 January 2021); Bora Laskin Faculty of Law, “[Law \(Laws\) Courses](#)” (last visited 30 January 2021).

Perhaps a reason for the lack of educational offerings related to legislation and statutory interpretation in law schools is that students are not interested in these topics. However, given that legislation—as one of Canada’s most important sources of law—is pervasive, interest should be driven by legal educators. Research in Australia suggests that a blended-learning approach to teaching statutory interpretation can improve student engagement with the subject.<sup>108</sup> After the judiciary in Australia called the construction of statutes “the single most important aspect of legal and judicial work”, a Queensland law school transitioned its statutory interpretation course from the traditional lecture/tutorial/fact-pattern format to a narrative-centered learning experience.<sup>109</sup> The re-imagined course had students work through a mock statutory interpretation problem using an online platform that simulated real-life situations.<sup>110</sup> Upon completion, 85% of students reported that the program helped them engage with statutory interpretation more than they thought they would.<sup>111</sup> This research suggests that disinterest in statutory interpretation, and legislation in general, can be overcome with an effective teaching model.

## Conclusion

Understanding how legislation is drafted helps inform how legislation should be interpreted. Although the current approach to statutory interpretation in Canada is contextual and purposive, the legislation itself, including its words and structure, plays a critical role in the overall analysis. Understanding the conventions legislative counsel use, and the constraints they face, helps shed light on why a piece of legislation is the way it is. This helps interpreters formulate and evaluate arguments about why certain interpretations of legislation should be preferred over others, thus enhancing the exercise of statutory interpretation. However, despite the benefits of incorporating knowledge of drafting in statutory interpretation, drafting guides and conventions are seldomly referred to in case law. Further, drafting ideals commonly set for legislative counsel fail to sufficiently reflect the operational realities of legislative drafting. Enhanced education, starting from law school, is required to address these issues and create a new generation of informed interpreters.

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<sup>108</sup> James Duffy, Des Butler & Elizabeth Dickson, “Engaging SEX: Promoting the **S**tatutory Interpretation **E**Xperience in Legal Education” (2015) 40:1 *Alternative LJ* 46.

<sup>109</sup> Duffy, Butler & Dickson, *above* note 108 at 46-48.

<sup>110</sup> *Ibid* at 48.

<sup>111</sup> *Ibid*.

## Book Reviews

### *European Legislation: A country by country guide*

Edited by Ulrich Karpen and Helen Xanthaki, published by Hart Publishing: Oxford, 2020

#### **Reviewed by Lucy Marsh-Smith<sup>1</sup>**

This book is a collection of critical essays examining law-making in no less than 30 different European jurisdictions, namely Austria, Belgium, Bulgaria Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Rumania, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the UK, plus the European Union.

The editors are Ulrich Karpen, Professor of Constitutional and Administrative Law at the University of Hamburg and a one-time German politician, and Helen Xanthaki, Professor of Law at University College London. Professor's Xanthaki's many other achievements include her authorship of the most recent edition of *Thornton's Legislative Drafting*.<sup>2</sup> The individual chapters are written by leading academics or occasionally senior practitioners from, or with significant experience of, the law-making operations of the countries concerned.

The common theme is “legisprudence”, the study of theory and practice of legislation, an increasingly important field of academic study both nationally and comparatively. Thus, each chapter describes not only the constitutional environment, nature and types of legislation and the legislative process of each country, but also the drafting processes, including by whom the legislation is drafted, what training is provided to drafters and the extent to which these countries strive for better legislation. It is these latter aspects that are likely to be of most interest to CALC members. As most of the jurisdictions considered are not common law jurisdictions and fall outside of the Commonwealth, much of this material is likely to be new to our membership. The book reveals a diverse selection of models for the production of draft legislation. There is, however, a common desire among the various nations to produce less, but higher quality, legislation, something we can all identify with.

The preface explains the genesis of the book was a 2012 conference in Berlin where the plan of a study of legislation in EU jurisdictions was presented. This led to an initial volume, with the same editors: *Legislation in Europe, a Comprehensive Guide for Scholars and Practitioners*.<sup>3</sup> This volume focused on principles and best practices, including the processes of drafting, the analysis of methodology and formal drafting techniques, approaches to regulatory impact assessment and monitoring and teaching “good legislation”.

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<sup>2</sup> H. Xanthaki, *Thornton's Legislative Drafting*, 5<sup>th</sup> ed. (Hayward's Heath (UK): Bloomsbury Professional, 2013).

<sup>3</sup> Oxford: Hart Publishing, 2017.

This later publication is a follow-up volume intended to be an investigation of legislative systems by authors considered to be experts in legislation in the respective countries, focusing in more depth on the theory and practice of legislation, and producing comparisons to guide national institutions.

Chapter 1 is an introduction by the editors, which forms a lengthy backdrop to the collection of critical essays about law-making in the various jurisdictions that follow. It brings together the main themes of the book and attempts to identify current trends. Legisprudence, as both a theoretical and practical science, can assist with reducing the quantity of, and improving the quality of, legislation. The comparative analysis provided by the book is intended to contribute to the aim of “Better Regulation” both nationally and in the EU generally. Important to this is analysing both governmental and parliamentary procedures, assisting with proper development of form and content of drafts as well as standards for evaluation and control. The chapter outlines law-making generally in a constitutional state, introducing themes of fundamental rights, democracy and the rule of law. It considers the types of legislation, other sources of law and the legislative process, before moving on to discuss the values and goals of law-making. This analysis is comparative, drawing on material from the various jurisdictions. It also covers the structure, language and techniques of law-drafting, and finally the extent to which the jurisdictions teach legislative drafting, an area where the civil law jurisdictions (which largely rely on mentoring on the job) are some way behind common law jurisdictions.

Chapters 2 to 32 consider the themes introduced by chapter 1 in each of the European jurisdictions (including finally the EU) mentioned above. Taken collectively it makes for some dense reading: the book is over 600 pages long, though country by country the material is compact and the number and range of jurisdictions covered is impressive. A list of further reading is provided for each chapter, should one wish to delve in greater depth, though these materials are usually in the native language. Each chapter follows loosely the themes outlined in the first chapter but varies in the amount of material it uses to address them, presumably because of the differing importance it has to each country. Each chapter is packed with facts about how that nation makes its laws, including Regulatory Impact Assessments as part of legislative scrutiny, and in some cases discusses how accessible the legislation is and the extent to which it has been consolidated.

There was notable variance in whether legislation is drafted centrally or in the various departments, whether drafters are legally qualified and the extent to which they rely on drafting handbooks. Despite the paucity of academic training opportunities, the common will to improve the quality of the statute book comes across.

Many of the jurisdictions will be unfamiliar to CALC readers and individual chapters provide a fascinating insight into constitutions and law-making in a range of different countries. Several of them have re-emerged as independent nations only a generation or so ago and more recently have taken on EU membership and the challenges that brings to the

law-making processes. In the case of the UK, the challenges are of course now in the other direction, though the relevant chapter was written before the completion of the Brexit process. The account of UK legislation makes particular reference to the Good Law Project<sup>4</sup> and the desirability of structuring legislation to be easier for the lay person to understand; data from the National Archives had established heavy use of its freely accessible website by UK citizens.<sup>5</sup>

The book's postscript concludes that comparative analysis of the previous chapters confirms the commonality of problems associated with legislation, namely its quantity combined with varying quality and a lack of accessibility. These problems continue despite the lengthy promotion and application of Regulatory Impact Assessments in most countries. Focus is now moving to the legislation itself and the need to focus on common legislative failures and to search for common legislative solutions. The EU is seen as a catalyst of legislative reform with its Better Regulation agenda being capable of expansion to include a better legislation agenda, looking to identify to whom the legislation is addressed and who uses it, so its messages can be clearly heard by those affected. It concludes that a new relationship between the lawmaker and the citizen could develop as lay people search and find legislative texts on-line without using a lawyer. There could be a new dawn of regulatory engagement involving many more people. Going further, drafters could have a key role in instilling trust between the State and the public, ending the current aversion to authority. The editors hope that both books together will facilitate cross-fertilisation of innovation and best practice in Europe and beyond.

These are high ideals, especially as the EU does not seem from this text to emerge as being ahead of the game with its own legislation, and one is left with the impression that the UK, perhaps more influenced by its Commonwealth partners, is leading the way.

The book describes itself as a necessary addition to law and policy libraries, law-making institutions and agencies, and an invaluable tool for constitutional and drafting academics and practitioners. It certainly provides a good way to attain a broad overview of how legislation is made across Europe, and an introduction to law-making in a vast array of European countries. It is unique in the wealth of its coverage. The extent to which it will be a catalyst to improve the quality of European legislation and its accessibility to the general public, both in terms of its readability and availability, is a matter to assess in the longer term.

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<sup>4</sup> The Project was undertaken by the National Archives in cooperation with the UK Office of Parliamentary Counsel - see <https://www.gov.uk/guidance/good-law>. The project has concluded but the initiative is now part of OPC's list of priorities.

<sup>5</sup> Available at <https://www.legislation.gov.uk/>.

*International Legislative Drafting Guidebook: 25<sup>th</sup> Anniversary Celebration*

Edited by David Marcello, published by Carolina Academic Press: Durham (NC), 2020

**Reviewed by Dale Dewhurst<sup>1</sup>**

*International Legislative Drafting Guidebook: 25<sup>th</sup> Anniversary Celebration*, edited by David A. Marcello, is a 274-page collection of 18 chapters in 7 sections. The contributing authors' expertise originates both from U.S. bicameral processes and from parliamentary system expertise. The topics discussed have broad applicability and are often rooted in international experience and training initiatives. The chapters provide a broad selection of discussions, ranging from regulations to constitutional instruments; they include in-depth discussions of theory and practice; and, they challenge readers to engage with important ethical questions.

The collection considers substantive topics such as human trafficking, climate change, environmental and agricultural law, and privacy and access to information. These are accompanied by more practice focused chapters discussing working with legislators, drafting instructions, and constitutional requirements. Finally, the substantive and practical topics are effectively tied together by ethical considerations, negotiation and alternative dispute resolution processes, and examinations of justice system failures and reforms.

Section I asks, "How does a drafter ensure that the draft legislation accurately reflects the intentions of those requesting the legislation?" Don Revell guides readers through key examinations of the impact that good (and bad) drafting instructions have on achieving this goal. He examines how teamwork is essential to sort through the formal, informal, and implied instructions that drafters receive. Revell provides proactive advice on how the drafter (often a late comer to the process) must use probing but respectful questions to achieve the desired outcomes.

John Strylowski takes a particular look at drafting clear and effective regulations. What are the key functions of regulations and how should one approach them? First, and foremost, Strylowski recommends drafters remember that regulations must serve as effective instructions to end users. The chapter discusses seven main ideas that lead to clear and usable regulations.

Philip Knight's chapter rounds out the section by considering the broader and more encompassing role of those drafting constitutional text. Here, a focus upon *the* clear, precise, and ordinary meaning of words is not sufficient. Instead, certainty must be judiciously combined with appropriate levels of generality and vagueness to achieve the desired goals. The desired meaning must be created in the mind of the reader through the impact of the words within their context. Emotive, creative, and integrative functions must be attended to when drafting constitutional documents.

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Section II of the book turns to broader context drafting issues relating to human trafficking and justice system failures. Mohamed Mattar examines ten often discussed topics in human trafficking legislation. He then develops a focus on the under-examined roles of binding conventions and soft principles and guidelines in human trafficking laws; and, examines the importance of six related interpretive precepts. Because full ratification may be slow in coming, it is these guiding soft principles that may prove to be more effective, at least in the short term.

However, what should be done in the face of 25 million refugees worldwide; and, a lack of trust in the courts in 9 out of 10 countries in the world? These questions are the focus of Frank Emmert's contribution. After setting out several depressing (but accurate and illuminating) examples of justice system failures and their consequences, Emmert moves to the bulk of his chapter: what can be done about these justice system failures? He starts with analyses of the connections among democracy, market economy and the rule of law. He then asserts that focus must be placed upon the "real rule of law", instantiated by specific, tangible and applied procedures.

In Section III, a well-matched trilogy of chapters examines legislative drafting in service of more global challenges such as climate crisis, environmental challenge, and agricultural reform. Estelle Appiah draws upon Ghana's experiences as a "test-case" in the climate crisis area. She examines the role of international treaties and considerations that drafters must keep in mind when preparing legislation, that is: (1) effectiveness in addressing climate change; (2) responsiveness to the rule of law in a global setting; and, (3) compatibility with Ghana's constitutional context. The role of human rights, globalization, treaties, and sustainable development are discussed in the context of preparing effective climate crisis legislation.

Machelle Hall turns to a narrower focus related to drafting specific environmental laws. Environmental legislation is inherently challenging because of ever-growing scientific expertise and the limits of human agency to control the environment. She discusses criteria for assessing environmental law objectives, effectiveness indicators, and realist assessments of behaviours that can be meaningfully regulated. Selected examples of the topics Hall considers are: impacts on human health; correlations between compliance and effectiveness; making legislation and regulations manageable; recognizing the requirements of the sectors where the laws will be applied; and, the interconnection between national and international environmental laws.

Jessica Vapnek's chapter further narrows the reader's focus to a consideration of more particular environmental drafting – agricultural legislation. Because "agriculture is a nexus for so many diverse subject areas", such as health, environment, and trade, an initial challenge is determining the scope of the proposed legislation. To sort through the different conceptions of agricultural law, the fuzzy borders between agriculture and other related areas, and several other challenges she identifies, Vapnek examines: categories of

agricultural legislation; regulating agricultural inputs; dealing with natural resources; and, sanitary and health related drafting. She concludes with helpful practical considerations drafters of agricultural legislation may wish to keep in mind.

Moving from particular areas of drafting, Section IV examines the importance of various legislative relationships. Bruce Feustel's chapter begins with the sometimes-problematic relationship between elected members and legislative drafters. Fuestel identifies some of the most common complaints drafters have about members, and vice versa. He then sets out a number of respectful relationship principles and best practices found to be beneficial in resolving drafter-member tensions.

Pius Perry Biribonwoha's chapter turns to the growing and supportive professional relationships amongst the in-house counsel serving parliaments across the African continent. As the use of in-house grew, an emerging need was to develop the necessary supports and collaborations to assist them. In response, the Africa Colloquium of Legal Counsel to Parliaments was formed. Biribonwoha discusses the Africa Colloquium, its initial needs assessments, and the development of its core objectives. His detailed identification of the roles, educational needs, and service delivery are a useful guide for developing similar organizations.

Lou Giezel's final chapter in the section engages the connections between drafting and negotiation skills. Rather than creating specific legislation or regulations to govern behaviour, drafters can use laws and rules to create meaningful Alternative Dispute Resolution (ADR) frameworks to directly empower individuals to resolve their legal issues. Giezel considers primary definitions that support these processes. He also identifies central mediation and negotiation skills that may be built into the ADR frameworks (and, as an added benefit, ones that are useful for the drafter when working with diverse stakeholders).

In Section V, the volume shifts from primary to regulatory work, towards drafters' roles in the creation of new agencies, boards, commissions, and similar tribunals. Stephen Maher begins this section with an examination of American administrative procedure and points out ways that drafting approaches have direct impact upon the efficiency, accuracy, and legitimacy of the rules created. Maher points out that he is not presenting his analyses as an export of American processes to the world. Instead, he explores essential considerations to keep in mind to avoid failures in the drafters' own jurisdictions.

Idella Wilson's chapter then looks at the task of creating a new entity (agency, board, commission) and the advantages and disadvantages of starting with a blank slate or building upon existing models. A blank slate approach risks tripping landmines that existing entities had carefully avoided or defused; tight adherence to the structure of existing entities may foreclose tailoring approaches to the new entities' mandate and purpose. How should the drafter choose between one, the other, or a blended approach? Wilson provides a detailed identification of critical considerations to avoid the landmines and to support the new entity

in attaining its goals. She concludes with comprehensive checklists and international drafting resources that will be indispensable for drafters engaged in this work.

In another well-matched trilogy, Section VI addresses governmental transparency, data security and data privacy. Laura Neuman focuses upon the essential roles that access to information and protection of privacy laws play in a healthy democracy. Properly drafted, such laws promote governmental transparency, help fight corruption, and allow citizens to have a meaningful voice in public life. What are the considerations that must go into preparing these essential laws? Neuman discusses four main principles, the provisions must be: (1) implementable; (2) realistic and sustainable; (3) drafted in simple and clear language; and (4) informed by the legal and cultural environment in which it is to function. She then examines how they aid the drafter when preparing 8 standard sections most frequently seen in access to information laws.

Bringing more focus to the access to information component, Sharonda Williams reflects upon the role played by open meetings and well-crafted open meeting laws. To this end, she examines important policy, scope, interpretive, and definitional considerations. Her chapter concludes with considerations of possible remedies for violations and selected procedural principles that will assist open law drafters to successfully complete their task.

Lothar Determann's chapter then grapples with fundamental considerations of policy and principle that underlie access and privacy legislation. He begins with the international state of access and privacy laws and important cultural, societal, and political perspectives that affect them. Omnibus data protection laws become too general, vague and difficult to update; a network of diverging, evolving, and targeted privacy laws create an impenetrable maze that users find impossible to navigate or enforce. Determann concludes by considering how solutions may lie in shifting focus to preventing actual harms, while remaining flexible to accommodate evolving technologies and data usage.

Finally, the compilation wraps up in Section VII with a two-chapter reflection on principal ethical and oversight considerations. The authors focus on local government ethics reforms and discuss how the principles also apply to state levels of government. David Marcello begins by assessing the impact of 3 local ethics bodies established in the wake of hurricane Katrina. Essential to this drafting is the importance of evaluating the jurisdictional authority, scope, and enforceability concerns for such these bodies. These analyses are then combined with discussions of key tools from Transparency International's toolkit. Marcello's chapter concludes with insightful applications of these principles to two of the three ethical bodies that were established.

In the final chapter, Susan Hutson picks up where Marcello left off by examining the third local ethical body established in the wake of hurricane Katrina – the Office of the Independent Police Monitor. The success of such a body lies in its legal structure, the support it can derive from the community, and the application of the right compliance and ethics standards. Hutson works through an assessment of seven key elements of these

compliance and ethics standards; and she provides critical and practical insights useful to drafters engaged in these areas of work.

Two pitfalls for a compilation like the *International Legislative Drafting Guidebook* are: (1) embracing such a broad survey of topics that the collection is of little practical use to experienced readers; or, (2) providing such detailed and esoteric guidance that it eliminates all broader appeal. This volume avoids both of these pitfalls. The chapters are well selected and organized to provide discussions ranging from drafting particular regulations to the creation of constitutional instruments. The collection embraces both theory and practice, challenges readers to engage with important ethical questions, and provides sufficient detailed guidance to benefit even the most experienced drafters. In a nutshell, it can serve as a central text for undergraduate level courses, as a specific resource for graduate level work, and as an excellent shelf resource for practicing drafters. It is a highly recommended, informative, and interesting read.

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