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Editorial Policies

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

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

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Editor's Notes

Lord Thring famously wrote "… it is the duty of every draftsman to know [the Interpretation Act] by heart and to bear its definitions in mind in every bill which he draws."[1] This issue of the *Loophole* begins with an article by Dylan Hughes and Neil Martin about this foundational element of legislative drafting – the Interpretation Act, reminding us of the importance of these Acts as a constitutional element of a law-making jurisdiction. They recount the drafting of a new Interpretation Act as an important step in the devolution of legislative authority to Wales and the establishment of the Welsh National Assembly. The review this entailed of provisions typically included in Interpretation Acts is a useful reminder of what these provisions accomplish and how they may need to be adapted to particular jurisdictions.

Dame Elizabeth Gardiner's remarks on the anniversary of the Renton Report follow, providing her perspective on an equally broad subject – improving the quality of the statute book. Much has happened in the legislative world during the 50 years since the Renton Report was published, particularly in terms of drafting. She imagines herself in the shoes of Lord Renton today, looking at what progress has been made and offering her views on what remains to be done to ensure UK legislation (and legislation more generally) functions effectively to accomplish the goals of those who enact it.

Next, Ronan Cormacain tackles a thorny issue that constantly bedevils legislative counsel – drafting ministerial powers. This subject is truly about "speaking truth to power", doing your utmost as legislative counsel to ensure, on the one hand, that ministerial officials have the powers needed to implement and enforce legislation but, on the other hand, that these powers are not excessive and do not undermine the law-making authority of the legislative body that delegates them. In short, what powers will ensure that law rules without undermining the rule of law.

This issue concludes with three book reviews. Legislative matters have been blessed with an abundance of recent reference works to augment the practice of legislative drafting. The reviews provide a taste of what they have to offer.

John Mark Keyes
Ottawa,
March, 2023

[1] Lord Henry Thring, *Practical Legislation*, 3rd ed. (Luath Press: Edinburgh, 2013) at 32, fn 1.

Upcoming Conferences

International Legislative Drafting Institute

The Public Law Center at Tulane Law School will once again host the two-week *International Legislative Drafting Institute* on Tulane University's campus in New Orleans, Louisiana, USA during June 12-23, 2023. The training is specifically designed for legislative drafters and for the members of legislative bodies.

The single best resource for information about the Institute is at its website: https://law.tulane.edu/international-legislative-drafting-institute. It provides a brief video that captures the "feel" of the Institute, as well as curricula from earlier Institutes recapping the speakers, presentations, and other events that make the two weeks in New Orleans so rewarding for participants.

The Institute now has more than 800 graduates from over 100 jurisdictions around the globe—legislative drafters and members whose collective expertise has been strengthening the legislative process and enhancing the rule of law since Institute training first launched in 1995.

Each year, the curriculum features new speakers and topics. This summer, Tulane Law Professor Herb Larson will discuss "Human Rights Laws and Multinational Corporations" and how the U.S. *Foreign Corrupt Practices Act* applies to foreign nationals and corporations. Amy Bunk will draw upon her years of service at Homeland Security, the Coast Guard, and the Federal Register to discuss "Drafting Agency Regulations" (subordinate or delegated legislation in parliamentary systems).

The Institute has also successfully hosted *non-English speaking delegations* from Azerbaijan, Bosnia & Herzegovina, Bulgaria, Georgia, Indonesia, Jordan, Kosovo, and elsewhere. With the aid of translated materials and simultaneous interpretation, delegation members participate fully in classroom lectures, exercises, and Q&A sessions.

The Institute provides a *tuition discount* for delegations of six or more members. Anyone interested in more information about *tuition discounts* or about hosting *non-English speaking delegations* should contact Assistant Director Idella Wilson via email: iwilson1@tulane.edu.

If interested in learning more through periodic updates, follow the Institute on Facebook or LinkedIn.

Introducing a new Interpretation Act: a brief history of the Legislation (Wales) Act / Deddf Deddfwriaeth (Cymru) 2019

Dylan Hughes and Neil Martin[1]

Abstract

The United Kingdom has long had a complex legislative landscape, reflective of a similarly complex history. This paper reflects upon decisions taken in Wales to develop an Interpretation Act applicable to the emerging body of (bilingual) Welsh law that has recently joined that landscape. In doing so the Welsh Government considered, firstly, the merits of Interpretation Acts generally and, secondly, whether a new Interpretation Act was sensible given the specific constitutional and legislative context. The paper refers also to comparative analysis that was undertaken as part of those considerations. Finally, the paper briefly refers to some of the further initiatives being implemented to make Welsh law more accessible.

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[1] Office of the Legislative Counsel, Welsh Government. We are grateful to our colleagues Claire Fife, James George and Kate Lewandowska who, as well as working on the Act, commented on an earlier draft. The paper is based on a presentation given by Dylan Hughes at the 2019 CALC Conference in Livingstone, Zambia but has since been updated.

Introduction

This article is about the development of the Bill that became the *Legislation (Wales) Act 2019* .[2] It focuses mainly on Part 2 of the Act, which concerns the interpretation of legislation.

The paper considers the operation of Acts that govern the interpretation of legislation today (and indeed in the future), but naturally our thinking has been heavily influenced by the past. We in the Office of the Legislative Counsel of the Welsh Government have been fortunate to be able to learn from what has gone before, not only within the United Kingdom but also across the Commonwealth. This is because there is, of course, a long history of enacting Interpretation Acts in common law jurisdictions[3].

Context

Setting the context involves an appreciation of a number of complex historical, constitutional, linguistic and political issues. Unlike the other nations of the UK, Wales had never had its own Interpretation Act. The UK Parliament first passed such an Act in the 19th century and its latest incarnation is the *Interpretation Act 1978*.[4] Notably, Northern Ireland has had its own *Interpretation Act* since 1954[5] and Scotland has had bespoke provision since 1999 (an interim Order based on the (UK *Interpretation Act 1978* was made as part of the

[2] 2019 anaw 4. The Bill's passage through Senedd Cymru can be seen here: http://senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=23311.

[3] See the associated paper by Ross Carter (Parliamentary Counsel Office, New Zealand): "Interpretation Acts. Are they, and (how) do they make for, great law?" (2022) 43(1) Statute Law Review 1, which was presented during the same session at the CALC conference in Zambia in 2019 (originally published in The Loophole 2-76 (November 2020)).

[4] 1978 c. 30 (UK).

[5] 1954 c. 33 (NI).

implementation of the *Scotland Act 1998*),[6] before the Scottish Parliament subsequently passed its *Interpretation and Legislative Reform Act* in 2010.[7]

That there was no equivalent for Wales is not surprising because, in modern times, Welsh law is a recent phenomenon. The reason for this is the annexation (in effect) of Wales under the English Crown by the 'Laws in Wales' Acts of 1535 and 1542, which sought to impose political, administrative, legal and linguistic uniformity across England and Wales.[8] As a result, unlike Scotland and Northern Ireland, Wales has not had its own legal jurisdiction since the days of Henry VIII and, again unlike Scotland and Northern Ireland, prior to devolution in 1999 laws bespoke to Wales were not significant in volume. Only a handful of Acts of the UK Parliament applied to Wales only and much of the subordinate legislation made for Wales by the Welsh Office (a UK Government Department) from the 1960s onwards closely followed what was being done for England.

Also significant is that the initial system of devolution in Wales, under the *Government of Wales Act 1998*,[9] was a very limited affair, essentially involving a democratisation of the Welsh Office. Uniquely, the National Assembly for Wales established by the 1998 Act inherited only Ministerial powers – largely those of the Secretary of State for Wales – and was initially able to make subordinate legislation only. It was also unorthodox as it was a single body corporate in which there was no formal division between the 'legislature' (such as it was), and the 'executive' formed from Members of the legislature. These arrangements, however, were not to last long. The *Government of Wales Act 2006* established the National Assembly for Wales as a fully-fledged legislature from 2007 onwards, and also formally established a Welsh Government.[10] The National Assembly was recently renamed as Senedd Cymru (the Welsh Parliament).[11]

Large elements of the unorthodox remained, however. Despite the substantial erosion of the uniformity sought to be imposed in the 16th century and (crucially) the emergence of a second legislature, no provision was made to de-couple the England and Wales legal jurisdiction. Also, again in contrast to the other nations of the UK, provision for the interpretation of the new Welsh primary legislation was made by amending and applying the UK *Interpretation Act 1978*.

This difference in approach is not properly explained by the absence of a Welsh legal jurisdiction. An Interpretation Act is about the law itself, and the existence of a Welsh legislature inevitably meant a new form of Welsh legislation would emerge that was

[6] 1998 c. 42 (UK).

[7] 2010 asp 10.

[8] 1535, c. 26 (UK) and 1542, c. 26 (UK).

[9] 1998 c. 38 (UK).

[10] 2007, c. 32 (UK).

[11] See Part 2 of the *Senedd and Elections (Wales) Act 2020*, 2020 anaw 1.

different from the law in England. Also seemingly overlooked were the implications of the fact that Welsh legislation is bilingual, with the Welsh and English language texts having equal status for all purposes. So, there was a clear case for an Interpretation Act for Wales as soon as the Welsh legislature had started to make its own primary laws.

Another important element of the context is a more recent Welsh Government policy to tackle concerns about the inaccessibility of Welsh law – concerns that have been raised more or less since the Welsh legislature was first created.

The causes of this inaccessibility are numerous and not always understood. Much of the problem is caused by the narrowness and complexity of the powers devolved to Wales, but more generally the state of the statute book is an issue across the UK due to the proliferation of legislation in recent decades. There are now more than 5,000 Acts and 100,000 statutory instruments in force and little or no consolidation has been done over the last 20 years or so. We have sought to illustrate a small part of the Welsh statute book demonstrating the range of numerous interconnected enactments at **Annex 1**.

The absence of a distinct Welsh legal jurisdiction is also a major issue. Leaving aside the common law, the laws of England and Wales now derive from two legislatures and two governments that routinely make different laws about the same subject matter. Across the body of law that *extends* to England and Wales only, some of the laws *apply* to England and Wales, some to England only and some to Wales only. And each of these three scenarios will often be found within the same enactment. The effect is that laws made in Wales for Wales, in two languages, form part of the law that may fall to be administered by a court 300 hundred miles away in the north of England (which will normally administer different law on the same subject made in England for England). We have sought to illustrate this at **Annex 2**.

Some of these issues were recently considered by the Law Commission of England and Wales. Its wide-ranging report, *Form and Accessibility of the law applicable in Wales*,[12] focussed on the need to bring order to the statute book, but acknowledged also the difficulty in relying on a monolingual Act to interpret bilingual Welsh law. And the Senedd's Constitutional and Legislative Affairs Committee's 2015 report, *Making Laws in Wales*[13], recommended development of a Welsh Interpretation Act.

[12] Law Com No. 366 (June 2016). Accessible here: https://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-in-wales/.

[13] National Assembly for Wales Constitutional and Legislative Affairs Committee, *Making Laws for Wales* (October 2015), paras 168-177 and recommendation 17. The Committee is now known as the Legislation, Justice and Constitution Committee of Senedd Cymru.

Early policy development

In 2016, set against unusual constitutional arrangements and inspired by the overarching aim of helping make Welsh law more accessible, we began to give serious thought to developing an Interpretation Act for Wales.

It may be worth mentioning what the 'we' in the last sentence means. This has been a particularly interesting experience because the main functions of developing and delivering the Bill were all carried out by the Office of the Legislative Counsel. And being responsible for the policy, legal analysis *and* drafting gave us more insight into what is involved in working on a Bill than we had previously.

In the early days of the process, we started by considering the fundamental principles and asked four questions:

1. Is an Interpretation Act a good idea (in general)?
2. Is a new Interpretation Act for Wales – within our particular context – a good idea?
3. If yes, what kind of Interpretation Act do we want?
4. What can we do to improve upon the Interpretation Act that currently applies?

It has been argued that Interpretation Acts are a flawed concept, or at the least are problematic. For example, see the article in the *Statute Law Review* from 2005 by Robert A. Duperron, entitled: "Interpretation Acts - Impediments to Legal Certainty and Access to the Law".[14] It is clear that their effects, and sometimes even their existence, are often not well known or understood, including among legal practitioners. As a result the suggestion is that they can make the law *less* accessible. If a person does not know of the existence of a particular rule or definition set out in an Interpretation Act, that person could end up with an incorrect understanding of the legislation they are reading. In that spirit, *Craies on Legislation* notes that some of the definitions set out in Schedule 1 to the UK *Interpretation Act 1978* give a "precise and unexpectedly technical meaning to an expression, ignorance of which could lead to serious misunderstanding".[15] At the very least, the existence of an Interpretation Act means that the reader of another piece of legislation cannot obtain a full and accurate understanding of that legislation without looking outside it.

However, we ultimately concluded that these were issues that could be mitigated. Conscious of their long history and ubiquity across the Commonwealth, we formed the view that Interpretation Acts remain a legitimate and useful tool to make legislation accessible.

[14] (2005) 26(1) Statute Law Review 64.

[15] 12th ed., Daniel Greenberg, ed. (Sweet & Maxwell: London, 2020), paragraph 22.1.4. See Chapter 22 generally for further consideration of the Act.

New Zealand's *Interpretation Act 1999* included a provision on the purposes of the Act;[16] this was expanded, and changed a little, in the equivalent provision in New Zealand's *Legislation Act 2019* (which replaced the 1999 Act).[17] The provisions in both Acts reflect a widely held view on the purposes (and indeed the merits) of Interpretation Acts, which is a view we share. Section 2 of the 1999 Act provided that they are:

a) to state principles and rules for the interpretation of legislation;

b) to shorten legislation[18]; and

c) to promote consistency in the language and form of legislation.

These purposes are similar to those advocated by the influential UK Committee on the Preparation of Legislation (the Renton Committee), whose report[19] led to (among other things) the promotion of the Bill for the UK *Interpretation Act 1978*.

We also concluded that in the Welsh context, while the existence and continued relevance of the UK *Interpretation Act 1978* within the jurisdiction of England and Wales meant that care was needed to make the interplay between the Welsh and UK Acts clear, it was not an impediment to developing our own legislation. Indeed, this is an issue that would be faced by any jurisdiction contemplating the development of a new Interpretation Act because of the likelihood that two Acts would continue to apply (an existing one applicable to legislation up until the point at which a new one would come into force and apply to all future legislation).

An important point of principle concerned remedying, or at least ameliorating, the linguistic issue we faced. Beyond that, it was also desirable to develop an Act that was tailored to Wales and Welsh law, taking the opportunity to modernise provisions of the UK *Interpretation Act 1978*. We also took the view that, given that Scotland and Northern Ireland already had separate Interpretation Acts, it would be appropriate (and indeed consistent) for Wales to have its own.

Principles followed (where possible) in developing the Act

This decision was, however, influenced by consideration of what *type* of Interpretation Act was suitable. We concluded that, when preparing an Interpretation Act, it is necessary to strike a balance between what can be set out once, for all purposes, in an Interpretation Act, and what should be set out in full in each piece of legislation. If that balance is properly struck then, in our view, the benefits of an Interpretation Act outweigh any concerns about

[16] 1999 No. 85 (NZ), s. 2.

[17] 2019 No. 58 (NZ).

[18] Section 3(2)(b) of New Zealand's *Legislation Act 2019* also refers to the Act allowing legislation to be "simpler".

[19] Report of the Renton Committee on the Preparation of Legislation (Cmnd. 6053).

their use. And these concerns included, in particular, the potential for complexity that arises from having an Interpretation Act for Wales while the UK *Interpretation Act 1978* also continued to apply.

With this in mind when we started to explore in greater detail how a Welsh Interpretation Act might work, and what it might contain, we realised that we needed to set ourselves certain parameters, and certain guiding principles. These underpinned our decision-making, and we applied them whenever we needed to choose between various options. In particular, they informed our decisions about the scope of the Act, the application of the Act (that is, precisely which Welsh law it should apply to), and the content of the rules contained in the Act.

Those principles and parameters were:

- the desirability of creating an Act that works best for the future statute book, recognising that the body of legislation made by Senedd Cymru and the Welsh Ministers (and, potentially, other bodies in Wales) will continue to grow (meaning that the divergence in law between England and Wales will continue to grow);
- recognising that because the UK *Interpretation Act 1978* would continue to operate within the jurisdiction and would apply to some of the law in Wales, the reader would need to be able to easily determine which Interpretation Act applies to the legislation they are reading;
- the need to minimise, and ideally avoid, creating any kind of operational tension between the new Act and the 1978 Act;
- the notion that Interpretation Acts should ultimately exist in the background, as a part of the machinery of law that the average reader will not regularly need to have recourse to (or in other words, it should not do too much);
- the need to address the absence of bilingual interpretation rules applying to the wide range of bilingual legislation which is currently in force (and in particular, the absence of rules defining words and expressions in the Welsh language equivalent to the existing rules in the English language);
- the desirability of the Act itself being as simple as possible to navigate, understand and apply.

We found that not all of these principles and parameters were fully reconcilable with each other. But crucially the notion that our Welsh Interpretation Act should exist in the background is consistent with the functioning of the UK *Interpretation Act 1978*. This was important because it minimises the potential for operational tension between the two Acts.

Also important was the conclusion reached, much the same as the one reached in Scotland a few years earlier, that (not surprisingly) there was nothing fundamentally wrong with the approach taken in the UK *Interpretation Act 1978* – or with its content. This led us to probably our most important guiding principle; that departing significantly from the

provisions of the 1978 Act could cause confusion and should only be done with good reason.

It was also vital that the application model we adopted for the Act (for determining when it applies and when it does not) was as straightforward as possible. It is for that reason that we chose a model that would require only two questions to be considered when considering whether the Act applies to any particular enactment:

(1) Where was it made?

(2) When was it made?

So, Part 2 of the Act applies to all legislation made in Wales by Senedd Cymru, the Welsh Ministers or any other Welsh public authority that has powers to make subordinate legislation on or after the date it came into force. This was 1st January 2020 (the start of a year, and indeed a decade, having been chosen deliberately).

We also concluded that more should be done to inform users of legislation about Interpretation Acts and explain their effect. This informed the drafting of the Explanatory Notes to the Act, which (among other things) seek to explain, on a provision-by-provision basis, the similarities and differences between Part 2 of the Welsh Act and the 1978 UK Act.

What's new in the Act?

In light of what is stated above it perhaps goes without saying that there are only limited differences between the Welsh Act and the UK *Interpretation Act 1978*. The most obvious and probably the most straightforward are that the Act is bilingual, and the list of defined words and expressions (found in Schedule 1) contains new content relevant to Wales (like "Counsel General" and "Welsh Revenue Authority") and does not include content from the corresponding Schedule in the 1978 Act that is irrelevant (like "London borough" and "colony"). Schedule 1 also re-defines "Wales", something that was a surprisingly complex exercise.

Other changes are less obvious, and most involve either technical provision about linguistic matters (in particular the Welsh language), modifications arising from societal or technological advancement, or modernisation of drafting. We consider the most significant changes below.

Section 8 of the Act provides that words denoting a gender are not limited to that gender. This provision serves two purposes. It is intended to be truly gender neutral (not limited to concepts of "he" and "she" – in other words, it is non-binary), and it also helps in relation to the Welsh text, since in Welsh, nouns are gendered. This is intended to complement, rather than in any way displace, the practice of gender-neutral drafting. Originally, we considered that a rule relating to gender equivalent to that in section 6 of the UK *Interpretation Act 1978* need not be included, on the ground that it was redundant given the long-established practice in Wales of drafting legislation gender-neutrally. But consideration of the Bill for

the New Zealand *Legislation Act 2019* (that was then before the New Zealand Parliament) gave us cause to revisit this conclusion. Section 16 of that Act seems intended to apply in relation to legislation which is in any event drafted gender-neutrally, as in Wales. In particular, we noted that, unlike section 31 of the (now repealed) New Zealand *Interpretation Act 1999*, it does not refer expressly to the male and female genders.

Section 9 also came about as a result of our comparative analysis of other Commonwealth jurisdictions. It provides that any grammatical variations of a defined term are to be interpreted in accordance with the definition. Here, we drew inspiration in particular from the Canadian *Interpretation Act*[20] and Hong Kong's *Interpretation and General Clauses Ordinance*[21] (we focussed on these precedents because both are from bilingual jurisdictions). This section's most obvious usefulness will be in cases where the rule it states may not be thought to be beyond doubt (see, for example, the definition of "education" in section 83(4) of the UK Parliament's *Children and Families Act 2014*, which makes provision about the application of that definition in relation to "educate" and "educational").[22] But it was also considered to be of particular use in relation to the Welsh language, to facilitate purposive and accessible translation, as it will make it clear that a definition or meaning applies regardless of any mutations of a word,[23] or variations of an expression arising due to rules about syntax (which is often different in Welsh).

Sections 13 and 14 build on the rules relating to delivery of documents in section 7 of the UK *Interpretation Act 1978*, and additionally put in place default rules for service of documents using electronic communication. While it was obviously necessary to deal with electronic service of documents, this gave rise to a number of questions and a lot of concern from stakeholders, particularly in relation to appropriate timeframes.

Section 13(1) applies wherever Welsh law provides that a document may or must be served (or given or sent etc.) by post. We considered providing for a more restrictive approach to service by post and requiring that some form of recorded or expedited delivery service be used, but our concern was that this could be overly burdensome, in particular if the act of serving involved sending multiple items by post. Subsection (2) applies where Welsh law provides that a document may or must be sent electronically and takes a similar approach to that taken in subsection (1). Subsection (2) also allows for the attachment of documents to an email, as well as for the email itself to be the document that is being served. It is not intended to facilitate service being effected electronically by sending someone a link to a document hosted on the internet, which the recipient must then take further steps to access. But it is intended to be broad enough to cover as many viable means of effecting service

[20] Interpretation Act, RSC 1985; s. 33.

[21] LN 88 of 1966 (HK), s. 5.

[22] 2016 c. 6 (UK).

[23] A mutation (or "treiglad" in Welsh) is the change of an initial consonant in a word caused by the preceding word. They are common in the Celtic languages.

electronically as possible. Of course, in future this provision may need to be revisited to reflect changes in practice and technology.

We considered an approach closer to that taken in Scotland in their *Interpretation and Legislative Reform Act 2010*, where the provision on service could be characterised as a standard form provision. In other words, it sets out a series of rules about how documents etc. can be properly served, and the related timescales. It applies whenever legislation merely provides that a document may or must be served (and says no more about the means of service). We did not do this, as we thought it best to continue to require individual Acts and instruments to deal with means of service, together with any additional requirements (for example, prior consent for service by electronic communications), on the face of the legislation itself. This helped to allay a recurring concern raised by stakeholders and consultees that the Act would lead to the day-to-day use of electronic communication to serve documents, whether or not the recipient consented to such service.

Section 13, among other things, addresses deemed service times where electronic communication is used. In order to reflect, to some extent, the near instantaneous nature of most electronic communication, and having regard to the views of stakeholders, this section provides that a document served electronically is deemed to be served on the day it is sent. There are a variety of approaches that could be taken in this context. In particular, we considered providing that service by electronic communication is instantaneous, or takes effect 1 hour (or some other shorter timeframe) after the communication is sent, or takes effect at the start of the next working day after the communication is sent.

Section 19 was influenced by section 41 of the New Zealand *Legislation Act 2019*, and is intended to address an issue that arises when a Senedd Act amends or revokes subordinate legislation. Although it is not common for a Senedd Act to amend or revoke subordinate legislation, it is not unheard of. Where this happens, it can give rise to questions about whether the amendment or revocation is in some way intended to limit the future exercise of the power under which the subordinate legislation is made. Sometimes express provision was made in the Senedd Act in question to remove any doubt about this, but the rule in section 19 of the Act makes this unnecessary.

Finally, **section 28** concerns the application of legislation to the Crown. Under the common law,[24] in the absence of an express provision binding the Crown, the question of whether an Act binds the Crown needs to be considered by looking at the rule and its limits, and then determining whether the nature, context and content of the Act in question mean that the legislature intended for the Crown to be bound. Section 26(1) replaces the common law rule with a statutory rule. It reverses the common law position so that a Senedd Act binds the Crown unless it provides otherwise. The application of this provision is complex (and,

[24] Most recently considered by the Supreme Court in *R (Black) v Secretary of State for Justice* [2017] UKSC 8; judgment was given while we were working on the Bill for the Legislation (Wales) Act 2019, a few months before the consultation draft was finalised.

therefore, puts the guiding principles referred to above under strain) but the change was made as a matter of principle, in particular because it means that a decision not to bind the Crown has to be made expressly.

What's not in the Act?

Perhaps more significant is what is *not* in the Act. An important provision of the UK *Interpretation Act 1978* has not been replicated, while other ideas for new provisions were eventually not pursued.

We refer above to the needs of users of legislation (rather than drafters) taking priority, and this is what inspired our decision not to replicate section 11 of the UK Act. That section provides that where an Act confers power to make subordinate legislation, expressions used in the subordinate legislation have, unless the contrary intention appears, the meaning that they bear in the Act. It is the provision linking subordinate legislation to its parent Act for the purposes of interpreting words and phrases – and one of its effects is to enable drafters not to have to address which terms should be defined or which are relevant for the purposes of the subordinate instrument. As is acknowledged in *Craies on Legislation*,[25] section 11 is a provision that can lead to misunderstanding. A reader of subordinate legislation, unaware of section 11, or even simply unaware that a particular term is defined only in the parent Act, could easily come to an incorrect conclusion. Section 11 helps the drafter more than anyone else, whilst creating the archetypal trap for the unwary.

The absence of a provision equivalent to section 11 in the Welsh Act means that something will need to be said on the face of subordinate legislation about the definitions of words and expressions used in the subordinate legislation and defined in the parent Act. Of course, this sets a new trap, this time for drafters, who will no longer be able to rely on section 11 and will need to deal with definitions, one way or another, in the subordinate legislation. But that, of course, will be our problem, and not the reader's.

Unlike the case in many other Commonwealth jurisdictions, none of the UK Interpretation Acts contains a provision requiring courts to take a purposive approach to interpreting legislation. On the face of it the absence of provision about principles to be adopted when interpreting legislation from an Interpretation Act seems like an omission. In our view it is, in general terms, a sensible proposition, and (specifically) from our perspective as legislative counsel it should, in theory at least, enable a more accessible approach to drafting. However, we did not include such a provision for three reasons.

The first was that we felt that such a provision would, in all probability, have little or no effect – and in consequence was unnecessary. This is because taking a purposive approach is now part of the normal practice of the judiciary in the UK jurisdictions[26]. This is also

[25] *Craies on Legislation,* above n. 15.paragraph 22.1.16.

[26] Ibid., chapter 18.

relevant to our second reason, which is that we felt the judiciary may not have been sympathetic to the legislature giving general direction about how they should go about interpreting the law. Having said that, doing so is not unprecedented and, paradoxically, that was the third reason for our decision not to include such a proposition. At present the *Human Rights Act 1998*[27] makes provision about interpreting legislation in accordance with the European Convention on Human Rights, and the *Government of Wales Act 2006* requires that a purposive approach be taken when considering whether legislation passed by Senedd Cymru is within its competence (and there are equivalent provisions for the legislatures in Scotland and Northern Ireland)[28]. European law has also had a major effect in moving away from more literal approaches to interpretation, both in interpreting domestic law so that it is consistent with European law and in the long-established schematic or teleological approach to interpreting European law itself. We concluded that adding our own provision about a purposive approach to interpretation (which would be the only one in the UK) would – in that context – probably lead to more confusion than clarity.

We considered similar issues in so far as the interpretation of any divergence in meaning between the two texts of Welsh legislation is concerned. Welsh legislation is made in both Welsh and English and section 156(1) of the *Government of Wales Act 2006* has long provided that both have "equal standing" for "all purposes". This is a widely known provision and there has been much focus, both within and outside the Welsh Government, on the need to ensure that the languages always have equivalent meaning. Much thought has been given within the Welsh Government to the skills and processes we need to ensure that the provisions are equivalent in both languages (something that included two visits to Canada in the early years of devolution to learn how very similar issues are addressed). It is for this reason that the Welsh Government has specialist legislative translators and jurilinguists and why at least half of the drafters in the Office of the Legislative Counsel must have high-level Welsh language skills.

Nothing is said in the 2006 Act, however, about what happens when (despite our best efforts) the legal effect of the texts don't match. This was an issue considered in some detail in Chapter 12 of the Law Commission's consultation paper on the *"Form and Accessibility of the law applicable in Wales"*[29]. It considers in particular the debate about a "shared meaning rule" in Canada and the effect of section 10B of the *Interpretation and General Clauses Ordinance* of Hong Kong, inserted in 1987. As well as providing for the equal status of the Chinese and English languages, the latter essentially directs the courts to apply the ordinary rules of construction equally to both languages in order to address a divergence

[27] 1998 c. 42 (UK).

[28] Further afield, note also that the model Interpretation Act of the Uniform Law Conference of Canada contains a provision on the interpretation of legislation. This is largely based on Elmer Dreidger's "Modern Principle of Interpretation" set out initially in Driedger's 1974 book *The Construction of Statutes* and later adopted by the Canadian Supreme Court.

[29] Law Com No. 366 (June 2016). Accessible here: https://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-in-wales/.

in meaning between the two languages. In other words, you should not compare the two meanings (like the shared meaning rule requires); rather, you should seek to ascertain the meaning of the legislature in the normal way but by reference to both languages.

Making similar provision for Wales was tempting, in particular because (although well known) the extent to which the practical implications of the equal status of the languages are properly understood is unclear. But, on balance, we eventually concluded once again that this is what the courts would do anyway and that doing so was not necessary. We were conscious also that the Law Commission (then Chaired by Lord Lloyd Jones, now Wales' representative on the UK Supreme Court) did not recommend making such a provision.

Restatement of provision in the 2006 Act about equal treatment of the Welsh and English texts

It would have been peculiar, however, to promote an Interpretation Act for Wales that didn't even mention the significance of law making bilingually. We therefore decided to restate section 156(1) of the *Government of Wales Act 2006* in the Act (something that also enabled us to address the provision in the Explanatory Note, and which meant that, at last, the rule governing the equality of the Welsh and English texts existed in Welsh, and not just in English). At the same time, we repealed the remainder of the section, which currently allows the Welsh Ministers (by order) to define a Welsh language word or phrase by reference to an English language word or phrase. This had never been used and was in our view at odds with the notion of both languages having equal standing.

Drafting improvements

Given that the UK *Interpretation Act 1978* was our starting point, and given that it is now many years old, as mentioned above we also intended to modernise the drafting when developing our Act. In looking back at the two Acts, however, the number of drafting improvements we eventually made is relatively modest. Interesting also is the fact that perhaps the main drafting change was structural – we chose to set out once, at the beginning of Part 2 of the Welsh Act, the proposition that most of the various rules in Part 2 apply unless a contrary intent exists. This is in contrast to the 1978 Act, which sets this out each time it arises. We felt on balance that this approach simplified the provisions that followed (and we were conscious that it is said 24 times in 31 sections in the 1978 Act). We were also influenced by the fact that we had to make provision at the beginning of Part 2 about the legislation to which Part 2 applies in any event.

We approached any drafting changes by being conscious that the wording used had been operating for some time, usually with few difficulties. Perhaps also because many of the provisions are already succinct, we concluded that few provisions needed modernising beyond minor changes such as changing the word "shall" each time (something that we

have always done, partly because it causes difficulties in Welsh language equivalence) and removing occasional references to more archaic words such as "thereto" and "thereunder".

However, there are probably two (minor) innovations worth mentioning.

The first concerns the provision relating to references to the time of day, which has in our view been improved. Contrast section 9 of the 1978 Act:

> **References to time of day.**
>
> Subject to section 3 of the Summer Time Act 1972 (construction of references to points of time during the period of summer time), whenever an expression of time occurs in an Act, the time referred to shall, unless it is otherwise specifically stated, be held to be Greenwich mean time.

with section 10 of the Welsh Act:

> **References to time of day**
>
> A reference to the time of day in an Act of Senedd Cymru or a Welsh subordinate instrument is a reference to Greenwich mean time; but this is subject to section 3 of the Summer Time Act 1972 (c. 6) (points of time during the period of summer time).

And the second is, we hope, both a drafting improvement and a clarification. Subsection (2) of section 20 of the 1978 Act reads as follows:

> **References to other enactments etc.**
>
> ...
>
> (2) Where an Act refers to an enactment, the reference, unless the contrary intention appears, is a reference to that enactment as amended, and includes a reference thereto as extended or applied, by or under any other enactment, including any other provision of that Act.

As well as being a relatively lengthy provision (which does a lot, broken up with 6 commas), there is an element of doubt about its meaning. This is because it is not totally clear whether the provision takes effect where the original enactment is amended *after* the second enactment refers to it. Subsections (1) and (2) of section 25 of the Welsh Act should put this beyond doubt in a way that is straightforward to the reader.

> **References to enactments are to enactments as amended**
>
> (1) This section applies where—
>
> (a) an Act of Senedd Cymru or a Welsh subordinate instrument refers to an enactment ("A"), and
>
> (b) at any time (whether before, on or after the day on which the Act receives Royal Assent or the instrument is made) A is amended, extended or applied by an enactment ("B").
>
> (2) The reference to A is a reference to A as amended, extended or applied by B.

Wider initiative to make Welsh law more accessible

As referred to above, this initiative forms part of a wider ambition for the Welsh statute book. This is reflected in Part 1 of the Act, which took its inspiration from section 30 of the

New Zealand *Legislation Act 2012*.[30] This required the New Zealand Attorney General to promote a programme of "revision" bills in each Parliament. It also contained a provision similar to section 3 of the UK Parliament's Law Commissions Act 1965, which requires the law to be kept under review. In its report *Form and Accessibility of the Law Applicable in Wales*,[31] the Law Commission agreed with the Welsh Government's proposed intention to pursue a policy of consolidating and codifying the law in Wales. So, section 1 of the Act requires the Counsel General to keep the accessibility of Welsh law under review, while section 2 requires the Counsel General and the Welsh Ministers to promote programmes of activity designed to make the law more accessible. Most notably this must involve consolidating and codifying the law.

Consolidating the law generally involves bringing all legislation on a particular topic together, better incorporating amendments made to legislation after it has been enacted and modernising the language, drafting style and structure. This involves no or only minor amendments to the substance of the law consolidated.[32] In Wales, consolidation of the law will to a significant extent involve re-enacting laws previously made by the UK Parliament, and doing so bilingually.

Codifying[33] the law is intended to bring order to the statute book in the form illustrated at **Annex 3**. This involves organising and publishing the law by reference to its content (and not merely when it was made) and maintaining a system under which that law retains its structure rather than proliferating. A "Code" of Welsh law would generally be published once some or all of the primary legislation on a particular subject (taking account of the legislative competence of the Senedd) has been consolidated, or has been created afresh following wholesale reform. This should usually be accompanied by a process of rationalisation of subordinate legislation made under the primary legislation (generally by the Welsh Ministers). The existing hierarchy within, and the delineation between, legislative instruments (primary and secondary legislation, and guidance or other similar documents made under the Acts or subordinate legislation) would remain. All the legislation within a Code will be made in both English and in Welsh.

So, a Code would not (generally) be one legislative instrument but rather a collection of enactments under a unifying overarching title. Those enactments which make up the Code

[30] This provision was repealed, but section 95 of New Zealand's *Legislation Act 2019* makes equivalent provision.

[31] Law Com No. 366 (June 2016). Accessible here: https://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-in-wales/.

[32] Senedd Cymru has amended its Standing Orders (by adding SO 26C) to provide for a special procedure for consideration of consolidation bills.

[33] References in section 2(3) of the *Legislation (Wales) Act 2019* to "codifying" the law mean, generally speaking, the codification of statute law (legislation). Although a Bill that codifies statute law might incorporate the effect of case law on the meaning of the legislation being consolidated and codified, or rules of common law that are closely related to that legislation, the Welsh Government does not intend to undertake wholesale codification of the common law.

on any particular subject would be made available together.[34] Similarly these enactments will remain the means by which the law is formally articulated. The Code is not intended to be a legal instrument in its own right but rather a means of collating and publishing the law more effectively.

In addition to this, other non-legislative measures are being pursued to improve the publication of Welsh legislation on legislation.gov.uk[35] and by developing explanatory material about Welsh law on a new website: Cyfraith Cymru / Law Wales.[36] Good examples of better explanatory material are the Explanatory Notes prepared to accompany the Welsh Act, which (as we say above) go to some lengths to describe whether each provision is substantively the same as a corresponding provision in the 1978 Act or is different – or new.

A diagram illustrating what we intend to achieve in more detail (using planning law as an example) can be found at **Annex 4**.

Wider constitutional reform

To end near where we began, the *Legislation (Wales) Act 2019* merely sets a foundation for a long-term programme designed to develop a modern, well organised and bilingual statute book for Wales. Much can be done to improve upon the highly unsatisfactory position in which we currently find ourselves. However, to be truly effective the wider context within which we legislate in Wales must also be addressed. The Welsh Government's objective is that the system of government in Wales should be further reformed in order to put in place stable constitutional arrangements. This requires the devolution of the justice system and the creation of a Welsh legal jurisdiction, something recently recommended unanimously by an expert and highly respected Commission led by the former Lord Chief Justice of England and Wales, Lord Thomas. The creation of a Welsh legal jurisdiction would complement our work on developing an orderly body of law for Wales and would bring synergy to the United Kingdom's legal systems, as is illustrated in **Annex 5**.

Conclusion

The *Legislation (Wales) Act 2019*, for the first time, made bespoke provision about technical matters concerning Welsh legislation and does so in both our languages. It puts in place interpretation arrangements that have existed elsewhere for more than a century and is, in that respect, a sign of the maturity of the Welsh legislature and of Welsh legislation. But in other respects, in setting a commitment to the making the law more accessible, it is novel

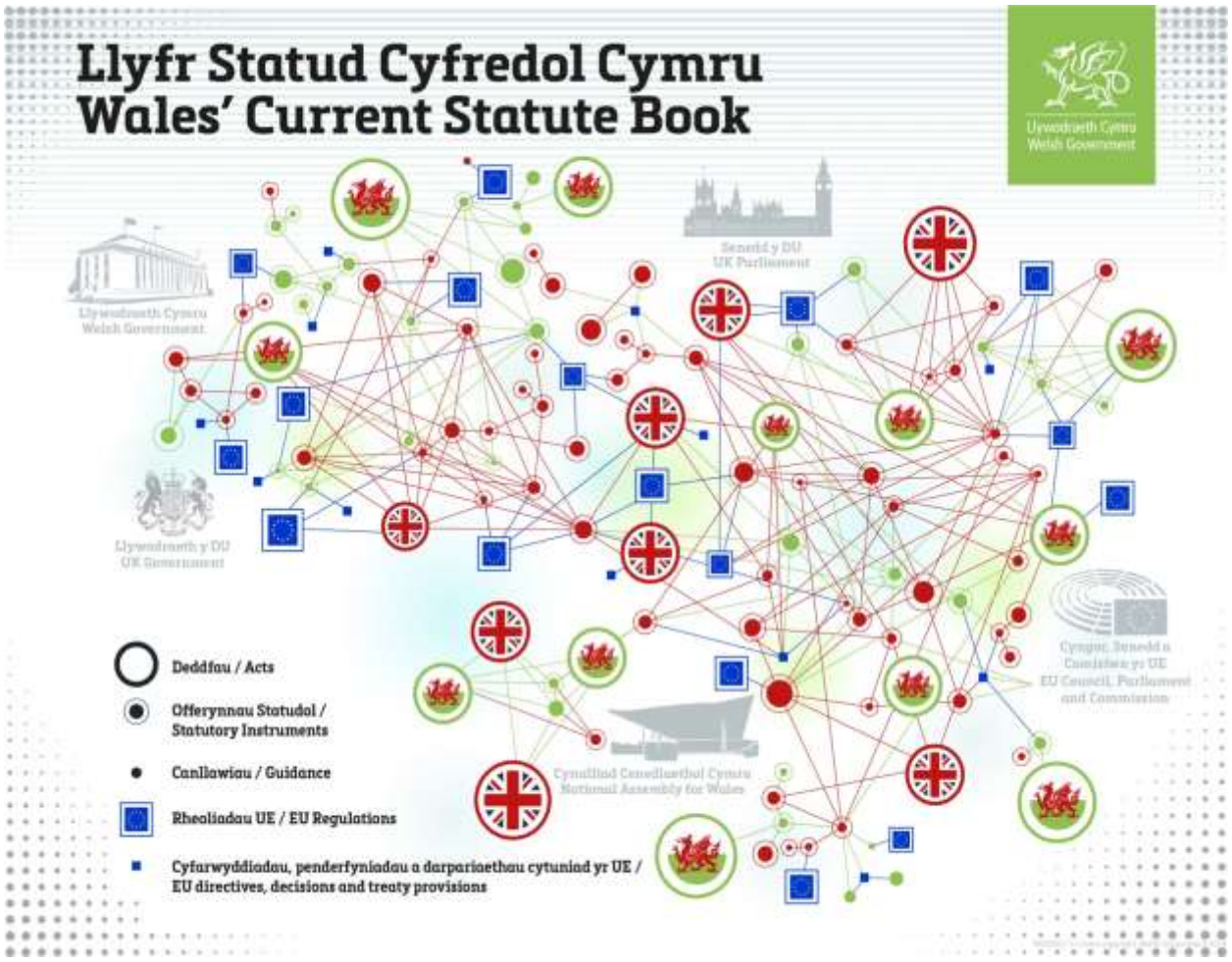
[34] Our intention is to collate all enactments that are designated as forming part of the "Code" of Welsh law on a particular subject together on one page of the Cyfraith Cymru/Law Wales website, with links to legislation.gov.uk. Links to explanatory material will also be included on that page.

[35] We also intend in future to make further provision about the publication of the law and the making of subordinate legislation. The necessity for reform at the UK level meant that this was not practical at this stage.

[36] https://law.gov.wales.

and embodies a desire to develop a better process of law making, and of promulgation of the law, that puts the users of legislation – the citizens of Wales – first.

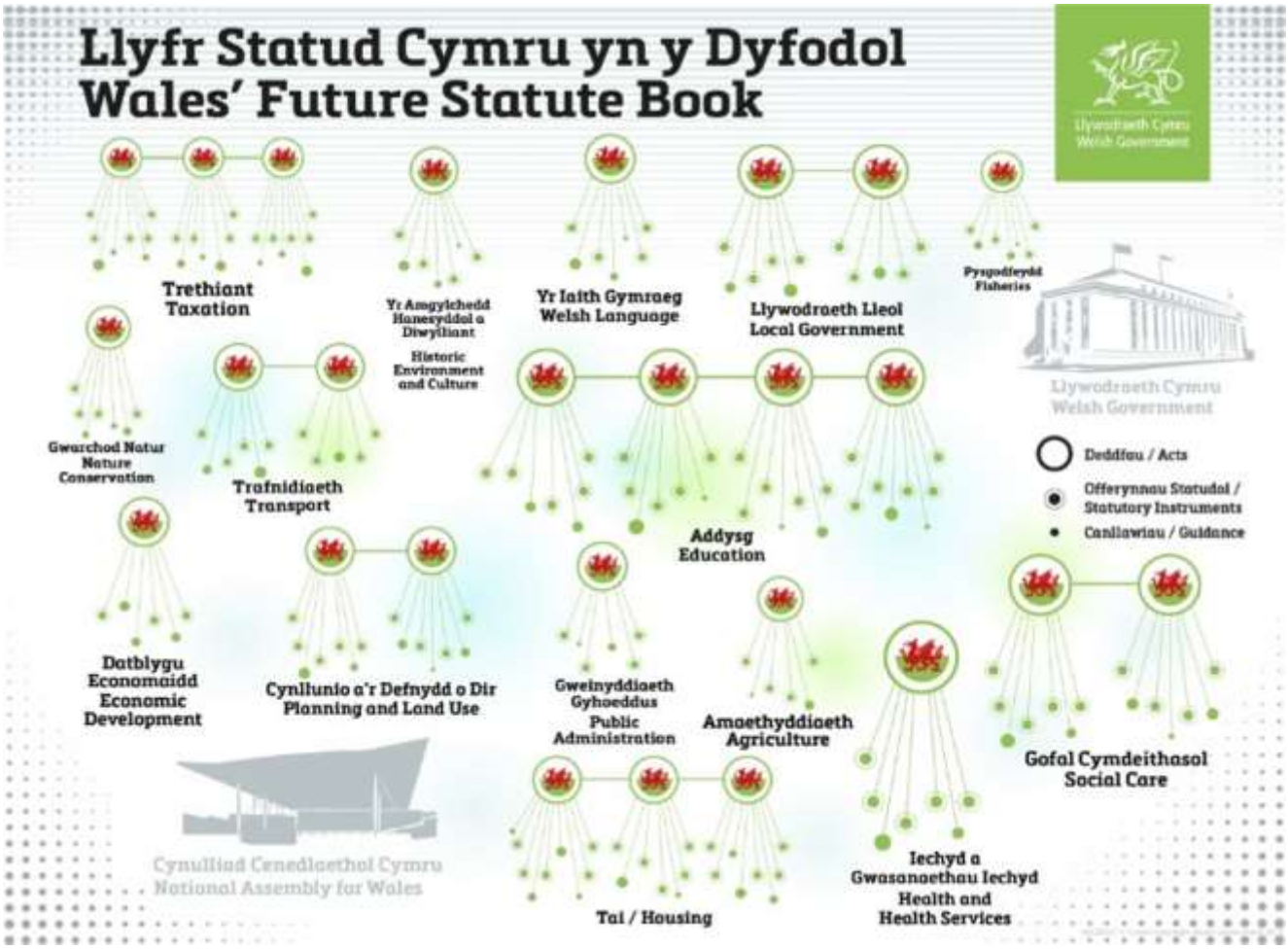
Annex 1


Llyfr Statud Cyfredol Cymru
Wales' Current Statute Book
Llywodraeth Cymru
Welsh Government
Deddfau / Acts
Offerynnau Statudol /
Statutory Instruments
Canllawiau / Guidance
Rheoliadau UE / EU Regulations
Cyfarwyddiadau, penderfyniadau a darpariaethau cytuniad yr UE /
EU directives, decisions and treaty provisions

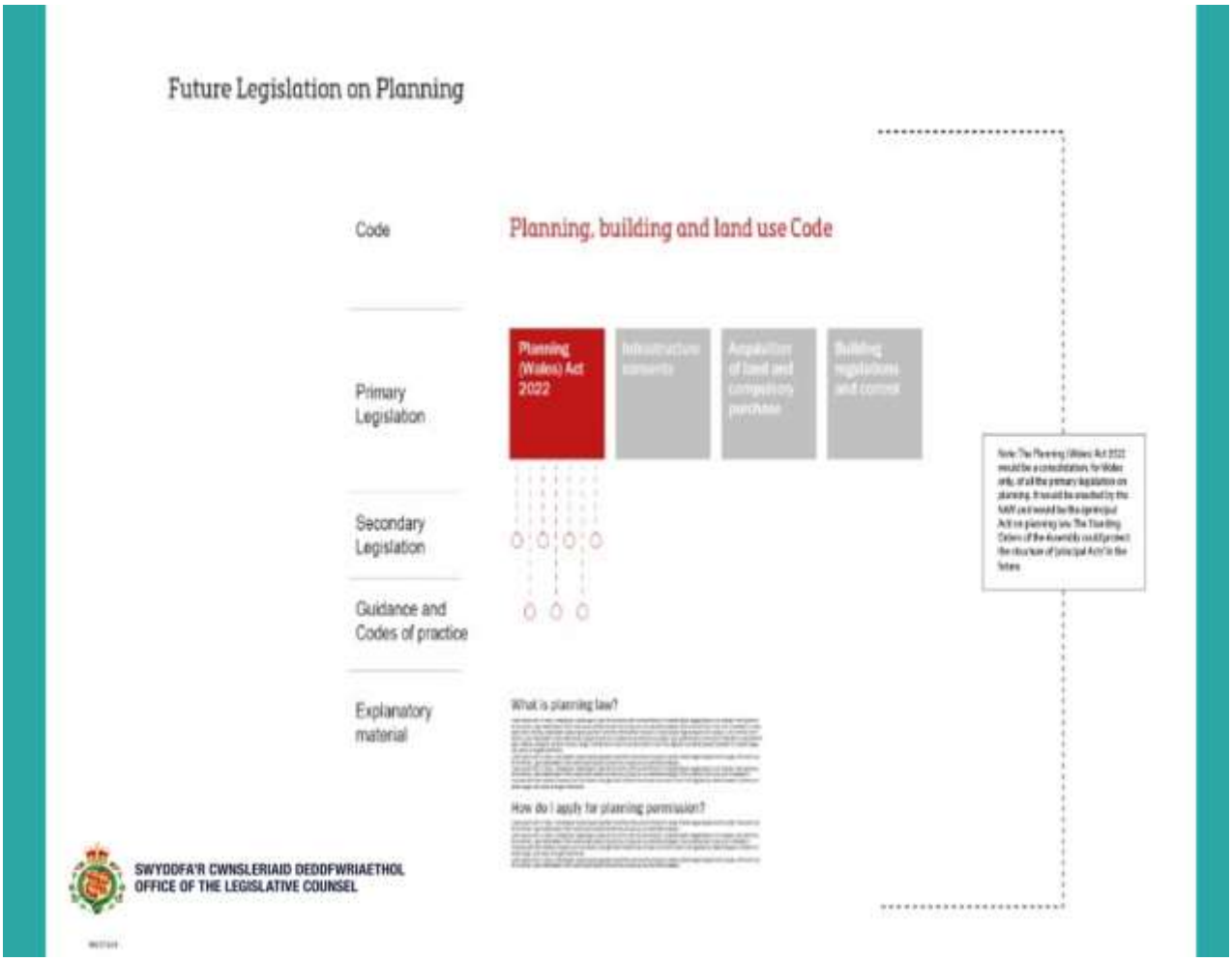
Annex 2


SWYDDFA'R CWNSLERIAID DEDDFWRIAETHOL
OFFICE OF THE LEGISLATIVE COUNSEL
UK legal systems: today
Legal jurisdictions
(and bodies of law)
Sources of Law

Annex 3


Llyfr Statud Cymru yn y Dyfodol
Wales' Future Statute Book
Llywodraeth Cymru
Welsh Government
Trethiant
Taxation
Yr Amgylchedd Hanesyddol a Diwylliant
Historic Environment and Culture
Yr Iaith Gymraeg
Welsh Language
Llywodraeth Lleol
Local Government
Pysgodfeydd
Fisheries
Llywodraeth Cymru
Welsh Government
Gwarchod Natur
Nature Conservation
Trafnidiaeth
Transport
Addysg
Education
Deddfau / Acts
Offerynnau Statudol / Statutory Instruments
Canllawiau / Guidance
Datblygu Economaidd
Economic Development
Cynllunio a'r Defnydd o Dir
Planning and Land Use
Gweinyddiaeth Gyhoeddus
Public Administration
Amaethyddiaeth
Agriculture
Gofal Cymdeithasol
Social Care
Cynulliad Cenedlaethol Cymru
National Assembly for Wales
Tai / Housing
Iechyd a Gwasanaethau Iechyd
Health and Health Services

Annex 4


Future Legislation on Planning
Code
Planning, building and land use Code
Primary Legislation
Planning (Wales) Act 2022
Secondary Legislation
Guidance and Codes of practice
Explanatory material
What is planning law?
How do I apply for planning permission?
SWYDDFA'R CWNSLERIAID DEDDFWRIAETHOL
OFFICE OF THE LEGISLATIVE COUNSEL

Annex 5


UK legal systems: future
SWYDDFA'R CWNSLERIAID DEDDFWRIAETHOL
OFFICE OF THE LEGISLATIVE COUNSEL
Legal jurisdictions
(and bodies of law)
Sources of Law

Improving the Statute Book: a Parliamentary Counsel's Viewpoint[1]

Dame Elizabeth Gardiner KC (Hon)[2]

Abstract

It is almost 50 years since the Renton Committee was appointed to consider how to achieve greater simplicity and clarity in statute law. What might the Committee say about the state of today's statute book? What recommendations might they make for reform? This article ventures to provide insight into these questions.

Table of Contents

[2] First Parliamentary Counsel, United Kingdom. The views and opinions expressed in this lecture are those of the author and do not necessarily reflect the views or positions of the UK Government or the Cabinet Office. This article is based on the Statute Law Society's Renton Lecture delivered on November 9, 2022.

Introduction

The title for my article has been shamelessly borrowed from an address given at the AGM of the Statute Law Society over 25 years ago, when Lady Mary Arden, a good friend to the Office of the Parliamentary Counsel and to the Statute Law Society, looked at the issue of improving the statute book from a Law Reformer's Viewpoint.[3]

Not everyone will be familiar with the work of the Office of the Parliamentary Counsel, so I will start there. Parliamentary Counsel, the title we give our legislative drafters, are civil servants, and the Office is part of the Cabinet Office. The "parliamentary" element of our title can be a source of confusion, but we are employed by the Government not Parliament. We currently have 54 parliamentary counsel, all barristers or solicitors. A very small team works at the Law Commission on law reform projects and consolidations. The rest work on Government programme Bills (and government-supported Private Member's Bills). In addition to drafting Bills, counsel advise on parliamentary procedure and practice and the handling of the legislative programme. The drafting of delegated legislation, by way of contrast, is undertaken by departmental lawyers, either in their departments or as members of the small central Statutory Instrument Hub (a group of seconded departmental lawyers who specialise in drafting delegated legislation).

I obviously do not need to say how influential Lord Renton was in the world of legislation. When I joined the Office of the Parliamentary Counsel in 1991, the 1975 review of the preparation of legislation by the Committee (the Renton Committee) he chaired was still frequently referenced.[4] Copies of the Committee's Report (the Renton Report) were treasured, and I still have my well-thumbed paper copy and remember how delighted I was when someone retiring from the office bequeathed it to me.

At any time, those in Parliament with a keen interest in, and understanding of, the production of legislation are a fairly select band. David Renton was obviously one of those experts, and, when he spoke on your Bill, it was always worth consulting Hansard to see what he had to say.

Re-reading the Renton Report in preparing this article, I was reminded how thorough and well-considered it was, and struck both by the continuing relevance of much it had to say, and, at the same time, by just how much the world has changed in the intervening 47 years.

Lord Renton noted with some frustration that, of the 81 recommendations put forward, only around 40 of them had been wholly or mainly implemented.[5] I think that number may have

[3] Lady Arden of Heswall DBE KC PC, retired Justice of the Supreme Court of the United Kingdom. *'Improving the Statute Book: A Law Reformer's Viewpoint*' [1997] Statute Law Review 169.

[4] *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (Cm 6053, 1975).

[5] Lord Renton, HL Deb 21 January 1998, vol 584, col 1584.

crept higher over the years as the evolution in drafting that has taken place over my career has largely aligned with the recommendations in the Report.

That said, no-one is suggesting there are not issues with the current state of the statute book, and I don't think the Renton Committee would be short of material for new recommendations. You'll be pleased that I am not detailing 81 recommendations this time around – neither are my suggestions intended to be comprehensive. Rather, they are the musings of a long-serving practitioner.

In many ways, the statute book has become more disorganised and inaccessible since 1975. So, if we are not to continue down this road, we need to explore new ways of addressing the issues. I doubt there is a silver bullet, and I hope the Renton Committee would recognise that we need to tackle the issues from a number of directions if we are to see meaningful change.

Renton Review

The Renton Committee was appointed in 1973 with representation from both Houses of Parliament and independent members. It was established

> [w]ith a view to achieving greater simplicity and clarity in statute law, to review the form in which public Bills are drafted … to consider any consequential implications for parliamentary procedure; and to make recommendations[6]

It was the first inquiry of its kind for 100 years.[7]

Even in 1973, concerns about the state of the statute book were nothing new. From Edward VI and Francis Bacon, to many who have previously spoken at Statute Law Society events, the failings of the statute book have been well-rehearsed over the centuries.

The Renton Report considered the arrangements made for drafting, the legislative procedure for Bills, how legislation was published, and the criticisms frequently made of the language and structure of Bills. It recognised the different audiences for legislation (and their conflicting needs), the pressure on drafting resources, the challenges faced by the legislative drafters, the role that might be played by computers (then in their infancy), the tensions in the arrangements then in place for drafting Scottish provisions for Westminster Bills and the challenges around consolidation. Its recommendations were comprehensive and are worthy of re-reading.

The prevailing concern that statute law "lacked simplicity and clarity" was supported by, amongst others, the Statute Law Society in its evidence to the Committee. The language used was said to be "obscure and complex", such that its meaning was "elusive and its effect uncertain". One consequence of the search for certainty was said to be "over-elaboration",

[6] Above n. 4 at para. 1.1.

[7] HC Deb 6 May 1973, vol 656, col 95-6.

which often produced the opposite result to the one intended. The final Renton Report contained a list of detailed recommendations about drafting techniques and approaches.

In a pre-internet age, the difficulty of accessing physical up-to-date copies of statutes was highlighted. Although computers were still in their infancy, the Committee recognised their potential to run a statute law database, to assist with typesetting during the printing stages of Bills, to assist in the search for consequential changes and as a mechanical aid to drafting.

There were some Committee recommendations to promote greater consolidation. The need for more explanatory material relating to Bills was identified and a recommendation for a new Interpretation Act was made.

Generally, it was recognised that achieving change in many areas was inhibited by a lack of drafting resources and this ought to be addressed immediately. No-one could disagree with that.

What Would a Renton-style Committee Say Today?

In the intervening 47 years, the appetite for legislation has only grown. The Renton Committee anticipated the self-perpetuating growth in the statute book, commenting,

> Many might think that as a nation we groan under this overpowering burden of legislation and ardently desire to have fewer rather than more laws. Yet the pressure for ever more legislation on behalf of different interests increases as society becomes more complex and people more demanding of each other. With each change in society there comes a demand for further legislation to overcome the tensions which that change creates, even though the change may itself have been caused by legislation, which thus becomes self-proliferating.[8]

The role of parliamentary counsel as described in the Committee's Report is still a very recognisable one. As in 1975, the prime duty of parliamentary counsel is to make sure that "a Bill does what the Government wants and that, as far as possible, it can be seen to meet that aim without confirmation by cases decided by the courts."[9]

Drafting style

So, I will start with an area where I hope the Committee would acknowledge that significant improvements have been made, that of drafting style.

The Renton Review focused a lot on drafting techniques. Importantly, in the decades since the Report was published, there has been an increased focus on the need to achieve greater clarity in the legislation we produce (something which is an explicit aim of drafting offices

[8] Above n. 4 at para.7.3.

[9] Ibid para. 10.4.

the world over).[10] Parliamentary Counsel now adopt a modern plain-English style, very different from that generally employed in the 1970s. I think we are less inclined to accept that lack of clarity is an inevitable price to pay for legal certainty, and perhaps more inclined to rely on a provision being given a common-sense reading.

The Tax Law Rewrite Project (which rewrote the legislation for direct taxes) acted as a very effective catalyst when it came to updating drafting approaches and styles in the UK.[11] Sentences and sections now tend to be shorter, and we make greater use of overviews, signposts and other techniques to help the reader navigate what, in many cases, are complex ideas. Textual amendment (one of the Committee's key recommendations) is widely employed, such that consolidated texts can be created rather than leaving the reader to navigate overlapping freestanding Acts (as was more common in past eras).

Whilst precedents are not ignored, innovation and incremental improvement also have a vitally important part to play in improving the quality of legislation. In this area, as in many others, we rely on the experience and good judgement of our parliamentary counsel to balance the competing demands in the drafting process.

In their chapter for an upcoming book on legislative drafting, my colleagues, Diggory Bailey and Luke Norbury, discuss approaches and techniques that can help clarity in legislation, and factors that get in the way.[12] They recognise that the Office of the Parliamentary Counsel has made efforts to "improve the quality of legislation, including by sharing our experience of what works well and listening and learning from the experiences of others, both within OPC and the wider drafting community."[13] Like Diggory and Luke, I believe that these "efforts have resulted in many improvements but there will always be scope for further improvement."[14]

[10] Office of the Parliamentary Counsel, *Drafting* Guidance (2020).

[11] The Tax Law Rewrite Project (TLRP) of HM Revenue and Customs in the UK was established in 1996, with the aim of making the UK's direct tax legislation clearer and easier to use. The TLRP intended to make the language of tax law simpler, while preserving the effect of the existing law, subject to some minor changes. See also Ipsos MORI Social Research Institute, Review of Rewritten Income Tax Legislation, Research Report Number 104 (HM Revenue and Customs: 2011).

[12] D Bailey and L Norbury, Preprint "*Clarity in Legislation*" (SSRN, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4260218 accessed 10 January 2023.

[13] Ibid at19.

[14] Ibid.

The structure of the statute book

Introduction

So, whilst we are by no means complacent and improving clarity remains a key focus for us, if I were appearing before the Committee I would be hoping that they would acknowledge the great strides that have been made in this area.

By contrast, in 2022 there is a rather less positive story to tell about the overall structure and organisation of the statute book. So, in this area, there remains great scope for improvement.

That said, Sir Granville Ram, former First Parliamentary Counsel, wrote in 1946,

> The chaotic condition of the statute book has been the subject of complaint for at least four hundred years, and it must be acknowledged that the history of the intermittent attempts to improve its form and arrangement is, in the main, a story of failure.

I am sure the Committee would not be defeatist.

Volume and unstructured nature

Many things contribute to the chaotic nature of the statute book. First and foremost, the statute book is vast and unstructured. We refer to "the statute book", but of course it is just a collection of many bespoke Acts, amended over hundreds of years, together with the various forms of subordinate legislation that have been made under those statutes, itself amended over the years. For the non-expert reader, the relationships between the different instruments that make up the statute book is not obvious. Furthermore, there is no consistent divide between the sort of material that appears in Acts and that which appears in secondary legislation.

Finding the law on a particular topic can be impossible without external aids. Acts are numbered chronologically. Driven by political and handling considerations, a single Act often contains material on a number of different topics (sometimes with little obvious connection). The law on a single topic may be spread across a number of Acts, pieces of retained EU law and subordinate instruments.

There is no free access to a completely up-to-date version of the statute book, and there is no subject index or official grouping of Acts by subject heading. To give a fairly mundane example, there are currently at least 5 pieces of primary legislation (and several secondary) governing when the Home Office can take fingerprints for immigration purposes, and only one of those actually uses the term "fingerprints".

The short title of an Act, particularly in a multi-topic Bill, may give few clues as to its contents (for example, who would know what an Enterprise Act was about, or that it

included provisions capping exit payments for civil servants).[15] Unlike statutory instruments, Acts have no standard subject classifications.

So complex is the picture that it is very difficult to estimate how much legislation is in force at any one time. Any parliamentary counsel operating on the statute book regularly stubs their toe on pieces of long-enacted legislation that have never been brought into force, or which have only been brought partially into force.

Devolution

The complexity which evolving constitutional arrangements within the UK has introduced into the statute book is a new development since 1975.

With three separate legal jurisdictions, we have a statute book which contains legislation which applies in all these jurisdictions and legislation which applies in one or two of them. Post-devolution, we have four separate legislatures, with the competence of each devolved legislature overlapping with that of the Westminster Parliament. So, legislation operating in devolved areas is not just legislation produced by the devolved legislatures. Old Westminster statutes in devolved areas still exist, and the Westminster Parliament will, from time to time, legislate in relation to devolved matters (usually with consent).

A number of different approaches have been taken to amending Westminster Acts which apply in devolved areas – some clearer than others.

Devolution is an example of where the statute book does not always mean what it says. For example, it is littered with references to the functions of the National Assembly for Wales which for many years have had to be read as references to the Welsh Ministers.

If an Interpretation Act is intended to shorten and simplify legislation, we are not short of assistance, with 4 separate Interpretation Acts, one for each nation (not to mention the continuing relevance of the instruments they superseded for older legislation). Much of the same material is covered in each but there are also differences. Working out which Act applies to a particular provision is not always straightforward.

Brexit

The Committee would no doubt also be interested to understand the impact of Brexit on the statute book.

Following the departure of the UK from the European Union, the statute book contains retained direct EU legislation brought into our law at the end of the transition period by the

[15] *Enterprise Act 2016*, s 41.

European Union (Withdrawal) Act 2018.[16] So, a reader is faced with many different kinds of instrument, which take different forms and, in some cases, are drafted in different ways.

Ensuring a workable statute book on departure from the European Union was a key concern, but also a huge and complex challenge with significant impacts on the statute book. To give one example, section 29(1) of the *European Union (Future Relationship) Act 2020* provides that,

> (1) Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation agreement….so far as the agreement is not otherwise implemented and so far as the implementation is necessary for the purposes of complying with the international obligations of the UK under the agreement.[17]

A short and expedient solution to a very knotty problem, but perhaps not the easiest provision to apply in practice in the future.

Pace of Drafting

Finally, the Committee might express concern about the ever-accelerating pace at which legislation is prepared.

In a speech in 1995, Lord Renton suggested that

> Governments should allow much more time for the preparation of major Bills, preferably two years, so that the draftsman is not rushed and so that there is enough time for thorough consultation with outside experts.[18]

An ability to draft at pace has always been an essential tool in the legislative drafter's toolbox. In recent years, Covid and other crises have demanded speedy response after speedy response, and this has raised expectations (inside and outside of Government) about how quickly things can and should be done.

One consequence of the pace is that everyone is likely to focus on making only essential changes and getting them right. Tidying up or improving the statute book is unlikely to be a priority in the available time (and unlikely to be welcome if it extends the length or scope of the Bill).

Another consequence of pace is that there are fewer opportunities for people to engage with and understand the legislation, and the complexity of the statute book does not assist those who wish to scrutinise new legislative proposals.

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[16] 2018, c. 16 (UK).

[17] 2020, c. 29, s. 29 (UK).

[18] Rt.Hon. Lord Renton, KBE, QC *The Evolution of Modern Statute Law and its Future,* Inaugural Statute Law Society Lecture, University College London, 1 November 1995, at 11.

New committee recommendations

So, faced with these challenges, what might a 2022 Renton Review recommend?

Codification or consolidation

As Lord Thring noted well over a hundred years ago,

> No-one can doubt that a code, or the reduction to a consistent and harmonious whole of the scattered fragments of the law of a country, is the ideal perfection of legislation.[19]

The Law Commission of England and Wales keeps the law under review with a view to

> its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.[20]

As a result, one of its aims is "to codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes," and to this end they are required to prepare "comprehensive programmes of consolidation and statute law revision."[21]

I doubt our new Committee would waste their time recommending complete codification of our statutes, common law and case law, as a practical solution to our current difficulties. The volume of law is so huge, and the landscape so complicated, that there can be no realistic prospect of it being codified as a whole.

Similarly, in 1975 the Renton Committee recognised that it would not be practicable to consolidate the whole statute book within a limited number of years.[22] In fact, with a few notable exceptions, consolidation work has, for a variety of reasons, taken something of a back-seat over the last decade or more.

Consolidations have tended to be large ambitious projects taking many years to complete, and some never being completed because they are overtaken by events. In a number of cases, the consolidation Act has been filleted very soon after it was enacted.

It seems to me that the Committee could usefully recommend that a more systematic and efficient approach to consolidation is adopted, with more emphasis on identifying the areas where consolidation would reap the most benefits, and on ensuring the volume and pace of consolidation brings about meaningful change.

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[19] Sir Henry Thring KCB, "*Simplification of the Law: Practical Suggestions"*, Sir Henry Thring KCB, (January 1874] *The Quarterly Review*.

[20] *Law Commissions Act 1965,* s 3 (UK).

[21] Ibid.

[22] Cm 6053, Ch 14.

I see the *Sentencing Act 2020* as a success in this regard.[23] This ambitious project had very clear goals and the prize of enacting the clean sweep was considerable.[24] Furthermore, a structure was established which it is hoped will stand the test of time and be amended to ensure a single *Sentencing Act* (constituting the *Sentencing Code* in Parts 2 to 13). But there are limited resources available to support consolidation work, and the project took many years to complete.

A colleague helpfully reminded me this week that 25 years ago we had relatively junior parliamentary counsel taking on significant consolidation Bills. Given other pressures, resources are always going to be a limiting factor. I think the Committee might usefully repeat its 1975 recommendation that

> The possibility should continue to be explored of recruiting and training for consolidation work lawyers with the necessary aptitudes even though they have not had the full training of Parliamentary draftsmen.[25]

Mapping the statute book to make it more accessible

The Committee might also usefully make recommendations aimed at mapping the existing statute book to make it more accessible, and identify opportunities for reform.

DefraLex illustrates what is possible, and is a model that could be reproduced in other areas.[26] DefraLex is an online system established by the Department for the Environment, Food and Rural Affairs (DEFRA) which lists and provides access to all the legislation for which that department are responsible (primary and secondary) and arranges that legislation by subject matter.

If UK Government departments each operated the same model, major strides could be made in imposing some meaningful structure on the statute book and making it more accessible. It would also be possible to enhance such a system over time to include other instruments such as directions under Acts, or to provide easy access to statutory or non-statutory guidance. Organising the statute book in this way would also help departments identify what legislation they have, what could usefully be reformed or consolidated and what could be repealed.

In Wales, they have set out even more ambitious plans to map, consolidate and arrange their devolved statute book. Importantly, their approach is underpinned by Part 1 of the

[23] 2020, c. 17 (UK).

[24] The clean sweep allowed the *Sentencing Code* to set out the applicable law without requiring courts to refer to separate commencement and transitional provisions and, in some cases, old sentencing law when dealing with offenders for convictions on or after 1 December 2020.

[25] Cm 6053, 1975, para. 14.18.

[26] Department for the Environment, Food and Rural Affairs, Defralex (legislation.gov.uk, 2023) https://www.legislation.gov.uk/defralex accessed 10 January 2023.

Legislation (Wales) Act 2019 under which the Counsel General and Welsh Ministers are to keep the accessibility of Welsh law under review and promote activities which make it more accessible.[27] Implementation of the Welsh plan will be resource intensive and limited progress has been made to date – but every journey begins with a single step and it will be interesting to see if this is a model that would work for us.

User-testing

As Renton recognised in 1975, the statute book has multiple audiences and, as parliamentary counsel, we are trying to keep each in mind. The Committee might reasonably suggest that we need to better understand what the various audiences for legislation want from the statute book, to inform any attempts to make improvements. Do we know what Parliamentarians think? What helps lawyers and non-lawyers who want to find out what the law is? How would judges like material presented? A better understanding of how these groups use legislation, and their preferences, would help ensure efforts are not misdirected.

Computers

Just as the Committee was quick to see the potential for computers, I am sure they would want to ensure full advantage is being taken of modern technology.

I imagine the Committee would be disappointed that there is still no free completely up to date version of UK primary and secondary legislation for the public to view on legislation.gov.uk. As Sir Cecil Carr put it "if English law will not allow us to plead ignorance of its contents, the State owes us the duty to supply us with the means of knowledge."[28] The Committee would, I am sure, recognise that substantial progress has been made and the significant headwinds faced by those running the legislation.gov.uk platform. Hopefully, they would recommend that all necessary support is now provided to create and maintain an up-to-date statute book.

Whilst style and techniques have changed over the decades, we still essentially draft to produce a hard copy product. We approach it much like a book, intended to be read from cover to cover. Given the way legislation is now accessed online, the Committee might usefully recommend that more research is done into the best formats and approaches for documents which are primarily read online. Accessing legislation online, the public may land on an individual section via a Google search, and not read the whole Act. Online publication may also bring new opportunities to assist the reader to navigate and understand the statute book. In an electronic age, could we provide up-to-date information about extent and commencement section by section? Would longer sections with internal headings be

[27] 2019 anaw 4.

[28] Sir Cecil Carr, 67 LQR 482.

better for the online reader than a run of shorter sections? Should hyperlinks be provided for defined terms? Should we aim for more signposts to help the reader navigate the document?

Devolution

Devolution is, of course, intended to permit differences to arise within the United Kingdom. But I think, particularly when it comes to amendments to older Acts, the Committee could rightly challenge whether we have done enough, as parliamentary counsel, to minimise unnecessary differences of approach and prioritise clarity. There are strong relationships between the four UK drafting offices, and we could explore whether there is more scope to agree approaches to common issues.

New powers to simplify the landscape

I am sure that, as in 1975, the Committee will be able to identify a raft of other things which might help improve the state of the statute book. They might like to consider the role that new delegated powers could play.

The *Deregulation Act 2015* conferred two powers which make small but useful contributions to simplifying the overall state of the statute book. Section 104 enables references to the commencement of an Act, or another event, to be replaced with the actual date (a useful tool – but one the Committee might recommend departments make better use of). Section 105 has simplified the landscape of secondary legislation by enabling legislative drafters to use regulations, by default, regardless of the type of instrument originally specified in the enabling power.

There are other similar sorts of changes that the Committee might like to consider, such as powers –

- to renumber Acts or parts of Acts where they have been heavily amended;
- to repeal legislation which hasn't been commenced after 5 years;
- to make a single instrument even if the underlying powers provide for different parliamentary procedures to apply (thus reducing the total number of instruments needed and the fragmentation of the law).

Whilst a handy back-stop for parliamentary counsel, one that may not find favour is a power to make minor corrections to Acts. Such a power exists in some other jurisdictions, but when it was proposed in the UK a *Times* newspaper leader apparently said:

> If Parliament, by reason of its legislative incontinence and hugger mugger proceedings is no longer capable of ensuring that it legislates with care and precision, the remedy for that sad degeneration is not to lighten the procedural penalties for carelessness but to increase them.

Other possible areas for recommendations

A more consistent approach to the labelling of Acts – to draw out the connections between them – might be a helpful development. Statutory instruments, by contrast, are allocated a subject category as well as a title.

Perhaps we can also learn from the past. Originally every railway had its own Act of Parliament, but eventually most of the common clauses were extracted into general railways Acts, leaving each company's individual Act to deal with exceptions and additions to the general rules. There are a number of areas where there might be scope for employing a similar technique to avoid repetition and improve the clarity of legislation.

Current parliamentary procedure is one driver for large multi-topic Bills. Multiple Bills are likely to take longer to pass through Parliament than a single combined Bill of the same length. If splitting out topics into individual Bills is better for the coherence of the statute book, then thought could be given to how parliamentary procedure might facilitate that. Similarly, we have discussed internally trying to "tidy as we go", by consolidating or restating a wider set of provisions where we are operating in an already heavily amended area. Time is always going to be a factor here, but current rules on scope also deter Government Bills from taking this approach, as it would open up for debate and amendment areas where the law is remaining unchanged (but being restated).

Conclusion

It is not difficult to identify many things which would have a beneficial impact on the accessibility of the statute book. The question is how can meaningful steps be taken?

Understandably, for politicians, new laws are generally more attractive than laborious attempts to consolidate or improve the statute book. So, whilst I do not imagine anyone is hostile to making improvements to the statute book, it is unlikely to be a political priority.

Wales is in a different place, given the desire to present Welsh law in a particular way, and as such has secured that political buy-in through the *Legislation (Wales) Act 2019*.

The Law Commission and parliamentary counsel are two players with a keen interest in the overall condition of the statute book. But we need a wider coalition of "the interested" to recognise that change is important, and that meaningful change will take time and needs consistent and sustained effort. For change to happen, I do not think it needs to be a high political priority, but it needs to be recognised that it should always be happening, in the background. The rule of law requires a statute book that is fit for purpose.

On a lighter note, I finish with some thoughts from Lord Thring on the subject of Simplification of the Law. He said:

> Everybody is a reformer. Every woman can say, and every man can write, how a scheme could easily be framed by which one small volume, or at most a few small

> volumes, should comprise, in a form intelligible to all, the wrongs of man, the rights of women, the mode in which those wrongs should be redressed, and those rights enforced. Opinions differ as to the reasons why the world is deprived of so great, so easily attained a boon. The House of Lords blames the House of Commons; the House of Commons makes an onslaught on the obstructiveness of the Lords; the Judges, with characteristic impartiality, denounce both Houses equally. On one point alone Lords, Commons and Judges alike agree, namely on the incompetency of the officials entrusted with the task of drawing Acts of Parliament.[29]

As you will have gathered, I have tried to share out the responsibility.

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[29] Thring, above n.19.

Drafting Ministerial Powers in accordance with the Rule of Law

Dr Ronan Cormacain[1]

Abstract

In order to comply with the rule of law, where a Minister is granted a discretionary power in legislation, that legislation ought to also set out the constraints on how that power may be exercised. This gives effect to the rule of law principle often summarized as "law not discretion". There are seven dimensions in which discretion can be constrained. Firstly, the power can be limited to being exercised for a particular purpose. Secondly, there can be a hurdle to be overcome. Thirdly, rather than a broad power to do anything, there can be a specific power to do specified things. Fourthly, additional factors to consider before exercising the power can be included. Fifthly, procedural safeguards can be inserted. Sixthly, there can be a requirement for some form of causal link or proportionality between the purpose of the power and the nature of its exercise. Seventhly, regard can be required to additional codes of practice or guidance before exercising the discretion.

Contents

[1] Consultant Legislative Counsel. This paper is an amended version of a chapter on constraints on discretion contained in Ronan Cormacain, *The Form of Legislation and the Rule of Law* (Hart Publishing: 2022). https://www.bloomsbury.com/uk/form-of-legislation-and-the-rule-of-law-9781509938056/.

Introduction

Most instructions for legislative drafters will at some point include a request that a Minister be granted a legislative power to do something. The nature of that "thing" will depend upon the context of the legislation to be drafted, but will often include: issuing directions, granting an application, enacting secondary legislation, making a decision, making payments, consenting to a course of action, etc. A search on the UK's legislation database (legislation.gov.uk) for the phrase "a Minister may" gives the answer "has returned more than 200 results". According to Thornton "a power implies a measure of discretion. The holder of the authority is authorised or permitted to exercise it but need not do so".[2]

How should this request to grant a power be turned into a legislative provision? Clearly, the nature of the power will determine how it is phrased, but there is the meta-question on how we deal with the discretionary aspect of the power. In short, what needs to be included alongside "the Minister may"? This article looks at the rule of law principles around the exercise of discretion and suggests guidelines on what this means for the way in which powers are granted in legislation. The central argument is that discretionary powers ought to have clear legislative constraints on how they are to be exercised.

Law not discretion as a rule of law principle

The English judge Tom Bingham, setting out his vision of the rule of law, said that "questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion".[3] The way in which a ministerial function is exercised should be within boundaries or limits set out in law, or by reference to criteria set out in law, rather than being simply a matter of personal choice. The rule of law means we are ruled by law, not by the exercise of individual preferences of individual ministers. The obligation that everything must be done in accordance with the law is one aspect of the principle of legality. The Canadian Supreme Court specifically noted one aspect of the principle of legality as being that "state action should conform to the Constitution and statutory authority".[4] Taking Lon Fuller's example of King Rex, there is no proper legal system if Rex can simply do anything he wants.[5] The principle of legality is satisfied by legislation authorising a Minister to act. But the principle of law not discretion is only satisfied if the legislation authorising the Minister has itself substantial constraints on how the thing may be done. Therefore, the over-arching drafting principle here is that the legislation ought to set out constraints on the

[2] H Xanthaki *Thornton's Legislative Drafting* 5th ed. (Bloomsbury Publishing: 2012) at 267.

[3] T Bingham, *The Rule of Law* (Penguin UK: 2011) 48.

[4] *Canada (*Attorney General) *v. Downtown Eastside Sex Workers United Against Violence Society,* (2012 SCC 45, [2012] 2 S.C.R. 524).

[5] LL Fuller, *The Morality of Law: Revised Edition* (Yale University Press: 1969).

exercise of discretion. In the phrase 'law not discretion', law means more than simply 'authorised by law'. It is a shorthand way of saying that decisions must be in accordance with clear, rational criteria, set out in law, which constrain the way in which the decision may be made and implemented.

In human rights jurisprudence the term used is 'in accordance with law' or 'prescribed by law', and this term encapsulates these points about law not discretion.[6] In adjudicating upon the meaning of "prescribed by law" within the context of the European Convention on Human Rights, the Supreme Court of the United Kingdom has this to say

> [people] must not be subjected to the arbitrary – that is, the unprincipled, whimsical or inconsistent – decisions of those in power … The law will not be sufficiently predictable if it is too broad, too imprecise or confers an unfettered discretion on those in power.[7]

In the same case, Lord Sumption criticised a "discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself".[8]

Given that both the rule of law and human rights law dislike unfettered discretion of officials, how ought ministerial powers be drafted? Or to put this another way, what is the nature of the constraints that ought to be included on legislative discretionary powers?

Seven dimensions in which discretion can be constrained

According to Thornton "it is important that the intended limits of discretion are defined by setting out those factors which are to be taken into account".[9] I contend that there are at least seven different dimensions, in which these constraints can be framed. These dimensions are not mutually exclusive and can be layered on top of each other as desired. The term 'safeguards' appeared in the Supreme Court judgement in *Beghal* twenty-one times in the context of the exercise of official discretion.[10] The dimensions set out here are all about ensuring there are adequate safeguards on how power is exercised.

To illustrate these different dimensions of constraints, I use a hypothetical legislative power that:

> The Minister may do the thing.

[6] M Amos, *Human Rights Law* 3rd ed. (Hart Publishing: 2021) at 103.

[7] Lady Hale in *In the Matter of an Application by Gallagher* [2019] UKSC 3, paragraph 73.

[8] Ibid., paragraph 17.

[9] H Xanthaki *Thornton's Legislative Drafting* 5th ed., (Bloomsbury 2012) at 268.

[10] *Beghal v DPP* [2015] UKSC 49.

Dimension 1: The purpose for which the power may be exercised

Requiring that a power can only be exercised for a particular purpose is the first dimension for constraining the exercise of discretion.

> The Minister may do the thing for the purposes of X.

Sometimes there will be no specific criteria to be satisfied before the power will be exercised, merely that the Minister may do the thing. This makes for the easiest kind of discretion to be exercised. More commonly, there will be a specific purpose for which the power may be exercised. So, in the *Police and Criminal Evidence Act 1984*, a court may exclude evidence if it would have 'an adverse effect on the fairness of the proceedings'.[11] In the Bail Bill, a court has discretion to refuse bail on the grounds that the defendant would fail to surrender to custody, commit an offence on bail, or interfere with witnesses.[12]

The more specific the purpose, the more the discretion is constrained. The broader the purpose, the less that discretion is constrained. Some purposes are so broad that they could cover practically anything. For example, the standard grant of legislative powers to British colonies was that they could 'make laws for peace, order and good government'.[13] A narrower purpose is that an official 'may, for the purposes of this Act [exercise the power]'.[14] Even this could still be too broad, and it can be better to specifically list a particular purpose in the Act for which the power may be exercised, for example 'for the purpose of bringing the matters contained in [a notice] to the attention of persons likely to be affected by them'.[15] Coronavirus has seen a resurgence in broadly framed purposes of 'preventing danger to public health as a result of the spread of infection or contamination'.[16] But even though this could be framed in a broad way, most of the interpretative provisions in UK coronavirus legislation state that 'any reference to infection or contamination is a reference to infection or contamination with coronavirus which presents or could present significant harm to human health'.[17]

Whichever way the purpose is framed, if the power can only be exercised for a particular purpose, then this limits discretion.

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[11] S. 78(1).

[12] Clause 3(1) in Northern Ireland Law Commission, "Bail in Criminal Proceedings" (Northern Ireland Law Commission 2012) NILC 14.

[13] This form of words was used many times when Britain had an empire. It is still used in current UK legislation for British Overseas Territories and other jurisdictions where the UK retains some legislative rights, see for example section 14 of the *St Helena, Ascension and Tristan da Cunha Constitution Order 2009*.

[14] Schedule 2, paragraph 9, *Crossrail Act 2008*, 2008, c. 18 (UK).

[15] Article 4(6), *Water and Sewerage Services (Northern Ireland) Order 2006*.

[16] One example among many of this kind of purpose is set out in regulation 34(3)(b) of the *Health Protection (Coronavirus, International Travel) Regulations (Northern Ireland) 2021* SR 2021/99 (now revoked).

[17] *Ibid*. regulation 2(3).

Dimension 2: The height of the hurdle

The second dimension is that there is some level which must first be reached before the power can be exercised. To put this another way, there is a hurdle to clear before the power can be exercised.

> The Minister may, if it is reasonable, do the thing.

There is a sliding scale for how easy it is to exercise discretion in a particular case. At the bottom of the scale, there is no hurdle at all, merely that 'the Minister may do the thing'. The scale then proceeds upwards until there is a very high hurdle to be overcome – 'the Minister may do the thing in exceptional circumstances'. The table below sets out this scale in a non-exhaustive way. The exact ranking on the scale is subjective.

Height of hurdle	**Legislative provision**
Low	The Minister may do X
	The Minister may, if the Minister thinks fit, do X
	The Minister may, if convenient, do X
	The Minister may, if appropriate, do X
	The Minister may, if expedient, do X
	The Minister may, if reasonable, do X
	The Minister may, if just, do X
	The Minister may, if necessary, do X
	The Minister may, in special circumstances, do X
High	The Minister may, in exceptional circumstances, do X

This hurdle can be further constrained by requiring there to be an objective rather than subjective test to overcome. A subjective test would be 'the Minister may do X if the Minister considers it reasonable'. This places the responsibility with the Minister, and allows the decision to be their subjective decision about what is reasonable. An objective test is 'the Minister may do X if it is reasonable'. This creates a higher standard, and won't provide an excuse for the Minister who exercises poor judgement. For Kouroutakis, 'appropriate is a more subjective term which leaves room for discretion to ministers, while the term necessary is more objective and limits the options only to what was required'.[18] It should be clear from the drafting whether this is to be an objective or subjective test.

[18] A Kouroutakis, "The Henry VIII Powers in the Brexit Process: Justification Subject to Political and Legal Safeguards" (2021), 9 *Theory and Practice of Legislation* 97 at 110.

Dimension 3: Specificity of the thing that may be done

A Minister can be given a broad power to do virtually anything. Alternatively, discretion is constrained if there is a narrow and very specific list of things that can be done. Contrast the following two formulations:

> The Minister may take any measures necessary, in order to fight crime. OR
>
> The Minister may impound the vehicle of a person who has been convicted of an offence related to the importation of illegal drugs, in order to fight crime.

Discretion is better constrained when a Minister is given a specific thing, or list of things, that the Minister can do. Discretion is less constrained when the Minister is given the broad power to do anything that they want in order to achieve a particular goal. The worrisome National Security Law that China imposed on Hong Kong contains the following provision:

> The Government of the Hong Kong Special Administrative Region shall take necessary measures to strengthen public communication, guidance, supervision and regulation over matters concerning national security, including those relating to schools, universities, social organisations, the media, and the internet.[19]

This is a duty rather than a power, but the point remains the same – that 'necessary measures' is worryingly broad and does not in any way constrain actions that the official may desire to take. Brigid Fowler of the Hansard Society complained about 'broad Ministerial powers used inappropriately' in the context of powers to make coronavirus regulations.[20] Although it can sometimes be appropriate to grant broad powers, it is better, particularly when the rights of the individual are being negatively affected, to enumerate a specific list of things that the Minister can do. In general terms, a power to do X, Y and Z, is better than a power to do to anything necessary.

Dimension 4: Adding additional factors to consider before the exercise of discretion

Discretion is constrained if the Minister is given a list of additional matters which must be taken into account before that discretion is exercised.

> Before doing the thing, the Minister must first consider A, B and C.

The legislation may sometimes state what factors the Minister must take into account in exercising discretion. When these are present, then the Minister must consider these factors and this thus acts as a constraint on the exercise of discretion. A bland requirement to 'take all relevant factors into consideration' is unhelpful – if it wasn't there, would we expect the

[19] Article 9, *The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, 2020, my emphasis.

[20] B Fowler, "The Care Home Covid Vaccination Regulations: A Case Study in Problems with the Delegated Legislation System" (*Hansard Society Blog, 9 August 2021*) .

decision maker to take irrelevant factors into consideration? However, these factors can often be helpful in guiding the Minister to the correct decision. The more detailed they are, the more predictable the exercise of the discretion. The factors can be exhaustive (only the factors listed in the legislation) or non-exhaustive (Minister can consider any other factors not listed which are thought relevant). For example, in the UK:

> (3) In determining for the purposes of this section whether procedures for self-regulation are effective OFCOM must consider, in particular—
>
> (a) whether those procedures are administered by a person who is sufficiently independent of the persons who may be subjected to the procedures; and
>
> (b) whether adequate arrangements are in force for funding the activities of that person in relation to those procedures.[21]

Instead of being given carte blanche to exercise discretion, the official is given a detailed set of criteria to consider before exercising that discretion. This acts as an instruction from the legislature about the proper way in which the power is to be exercised.

Dimension 5: Procedural safeguards before power can be exercised

Discretion is constrained if there are procedural safeguards which must first be satisfied before the Minister can exercise a power.

> Before doing the thing, the Minister must consult with / give notice to / allow representations from …

Thornton states that "the nature or importance of the power may require that procedural provisions are included in the statute".[22] A procedural safeguard is another hurdle which must be overcome, another way of constraining discretion of a Minister. It is usually most appropriate where the nature of the power is a decision affecting the rights of individuals – those individuals ought to have a right to be informed, to be consulted, or to have a route for their views being taken into account before that decision is made. On occasion it is helpful to spell out specific requirements on the nature of the consultation, requiring it to be "meaningful", see for example the Canadian *Impact Assessment Act*, section 33.[23]

Dimension 6: Proportionality / link between the thing to be done and the purpose of the legislation

Discretion is constrained if the Minister is obliged to have some sort of causal link, nexus or proportionality between the exercise of that discretion and the legislative purpose of that discretion.

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[21] Section 6(3) *Communications Act 2003*, 2003, c. 21 (UK).

[22] H Xanthaki, above n. 9 at 271.

[23] S.C. 2019.

> The Minister may do the thing if it is proportionate to the purposes of the Act.

Even if this is not explicit, administrative law will generally imply some sort of constraint along these lines. A bald power to do something in legislation will not be interpreted in a bald way by the courts. Instead, it will be subject to a host of criteria implied by administrative law. So, it will be implied that this discretion is not to be exercised capriciously, but must be exercised for reasons, that those reasons are rational, that the decision maker has considered all relevant factors and ignored irrelevant ones, etc. These rules are sometimes summarised as 'procedural impropriety'[24] or the 'rules of natural justice'.[25] The House of Lords considered this point in relation to the discretion of the Home Secretary to release prisoners serving a mandatory life sentence.[26] Lord Steyn stated that

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption.

So, in that case even though the statutory discretion was worded in very broad terms, concepts of reasonableness, legality and non-retrospectivity were read into it. In the *Unison* case, the Supreme Court went even further with implying certain fundamental values into the power to make delegated legislation. It held that the power to set court fees by way of delegated legislation did not include the power to set fees at such a level that they would restrict access to justice.[27] For John Laws this was based on the 'surely conventional principle that access to justice is not to be denied without very specific statutory authority'.[28]

However, even better than implied restrictions are express restrictions. So the legislation can itself state that there has to be some sort of nexus between the thing to be done and the reason for doing the thing. This overlaps with the imposition of a purpose dimension of constraints on discretion. The most common constraint of this type is the obligation that the exercise of power is proportionate to the end sought. For example, the Westminster Parliament in the UK passed the following:

> (5) A notice under subsection (1) must state why the Welsh Ministers consider that the issuing of the notice is an appropriate and proportionate action in all the circumstances relating to the incidence or transmission of coronavirus.[29]

[24] See for example Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[25] See for example *Al-Mehdawi v Secretary of State for the Home Department* [1989] UKHL 7.

[26] *R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539.

[27] *R (Unison) v Lord Chancellor* [2017] UKSC 51.

[28] J Laws, *The Constitutional Balance* (Hart Publishing: 2021) at 20.

[29] *Coronavirus Act 2020*, 2020 c. 7 (UK), s. 33(5).

Proportionality, or a nexus between the exercise of the power and its purpose, is a way of constraining a discretionary power, rendering its exercise more uniform and predictable.

Dimension 7: Additional codes and guidance

Discretion is constrained if the Minister is obliged to bear in mind additional requirements set out in official guidance.

> Before doing the thing, the Minister must have regard to guidance issued by the Department.

The legislation can also point to additional external requirements which have to be obeyed in the course of exercising a discretion. These could be obligatory requirements in a statutory form, for example a Code of Practice issued as a statutory instrument. Or they could be non-obligatory and non-statutory, for example official guidance issued by a government department. The most common approach is to require the Minister to 'have regard to' or 'consider' an extra-statutory document before exercising discretion. One point in favour of the legality of the discretion considered by the court in *Catt* is that there was a Code of Practice which 'leaves room for discretionary judgment by the police within specified limits'.[30] Although statutory guides are more immediately obvious, even a non-statutory guide will act so as to place limits on discretion.

How tightly does the discretion have to be constrained?

This paper has set out different ways in which discretion can be structured in legislation. A tightly constrained discretion would have:

1. A specific purpose for which the power can be exercised.
2. A (high) hurdle before the power can be exercised.
3. A specific thing which can be done.
4. Lots of factors to be considered before the thing can be done.
5. Procedural safeguards.
6. An express requirement for proportionality between the thing to be done and the purpose of the power.
7. A requirement to have regard to a code of practice before exercising the power.

A loose discretion would have exactly the opposite. But on what basis should the legislator decide to have a tight or a loose discretion? It isn't automatically the case that discretion should always be tightly constrained; there may be circumstances where maximum flexibility (and discretion) would be beneficial. As with so much to do with the drafting of

[30] *Catt v Commissioner of Metropolitan Police* [2015] UKSC 9, para 13.

legislation, there is no right or wrong answer. But in this section, I will set out some principles which may assist in determining the appropriateness of constraints on discretion.

Consequences of exercise of discretion

The more serious the effects on the individual of the exercise of the discretion, the more tightly the discretion ought to be constrained. So, the decision to release a life sentence prisoner has a serious impact upon the liberty of the prisoner, so that discretion should be tightly constrained. A decision to award a bursary for education has less serious consequences and can be less constrained. This point was made expressly by the Supreme Court in considering powers to detain at a port, 'the need for safeguards is measured by the quality of intrusion into individual liberty and the risk of arbitrary misuse of the power'.[31] The UK Parliament itself has recognised this principle with the Delegated Powers and Regulatory Reform Committee arguing that where Ministers are granted the power to define the elements of a criminal offence, the Committee would expect a compelling justification before this would be authorised.[32]

Nature of the decision maker

In determining the nature of the discretion, consider the integrity and skills of the decision maker. The more trust reposes in the decision maker, the less constrained the discretion needs to be. So, a judge may be given a broad discretion in reliance upon judicial integrity, training, experience and high standards of ethics and probity. Thus, the rules of procedure for the Inquiry into Historical Institutional Abuse are 'to be such as the chairperson may direct'.[33] This is because the chairperson has to be a high court judge. But if the decision maker doesn't have the same professional standards to adhere to, or has less training or experience, it may be more appropriate to more tightly constrain their discretion.

Review mechanisms

Consider also the existence of complaint or review mechanisms. The more prevalent these are, and the easier they are to access, the less constraint need be placed on the exercise of discretion as any defects in that exercise can be remedied by the complaint or review mechanism.

[31] *Beghal*, above n. 10, para 45.

[32] Delegated Powers and Regulatory Reform Committee, 7th Report of Session 2014–15 Special Report: Quality of Delegated Powers Memoranda (HL Paper 39) at 48

[33] S. 6(1) *Inquiry into Historical Institutional Abuse Act (Northern Ireland)*, 2013 No 2.

Example – discretionary powers of a judge in accepting late applications

A practical example may illustrate the exercise of these principles. The Inquiry into Historical Institutional Abuse has already been mentioned. The rules of the Inquiry are to be formulated by the Chairperson. He made a rule on late applications, ruling that they could only be accepted in "truly exceptional cases".[34] So there is a high hurdle for the exercise of discretion. Then the Chairperson had to have regard to the amount of time people already had to submit applications, and other ways in which people could present testimony to the Inquiry. So there are additional factors to consider. There isn't a blanket rule, and the Chairperson, as a judge, would have regard to all relevant factors. This approach was validated by the court when the exercise of this discretion was challenged by a person refused permission to apply out of time.[35] Dealing specifically with the amount of discretion, the court stated that 'In relation to the conduct of proceedings before the Inquiry, significant discretion must be afforded to the Inquiry.'[36]

Conclusion

There is an overarching obligation upon legislative drafters, and all those involved in the legislative process, to give effect to the rule of law.[37] One aspect of the rule of law, using Tom Bingham's definition, is that we are governed in accordance with law, not by the untrammelled exercise of official discretion. In this paper I have set out what this means in practice for the drafting of legislation granting ministerial discretion.

There are (at least) seven different dimensions in which discretionary power can be constrained in legislation. Firstly, the power can be limited to being exercised for a particular purpose. Secondly, there can be a hurdle to be overcome before the power can be exercised. Thirdly, rather than a broad power to do anything, there can be a specific power to do specified things. Fourthly, additional factors to consider before exercising the power can be included. Fifthly, procedural safeguards can be inserted which must be satisfied in advance of exercising the power. Sixthly, there can be a requirement for some form of causal link or proportionality between the purpose of the power and the nature of its exercise. Seventhly, there can be a requirement to have regard to additional codes of practice or guidance before exercising the discretion.

[34] A Hart, "Remarks at Third Public Session of HIA Inquiry" (Historical Institutional Abuse Inquiry, 4 September 2013) at 3.

[35] *In the matter of an application by DR for leave to apply for judicial review* MAG 9875 8/1/2016.

[36] *Ibid*. para [9].

[37] R Cormacain, "Legislation, legislative drafting and the rule of law" (2017), 5 *Theory and Practice of Legislation* 115.

I hope that these suggestions will be of some help for drafters doing a difficult job of balancing the everyday requirement of satisfying officials with the sometimes competing demands of complying with the rule of law.

Book Review

The Form of Legislation and the Rule of Law

By Ronan Cormacain, published by Bloomsbury Publishing, 2022

Reviewed by Eamonn Moran PSM KC SBS[1]

The Form of Legislation and the Rule of Law, by Ronan Cormacain, is a 328-page exposition on how the form of legislation can give effect to principles derived from the Rule of Law. Importantly, however, this book contains practical advice on how to draft compatibly with those principles and, in the process, ensure compliance with relevant elements of the Rule of Law.

The author is a Senior Research Fellow at the Bingham Centre for the Rule of Law in the United Kingdom. Perhaps unsurprisingly given the name of the institution at which Cormacain works, he adopts the definition of the Rule of Law given by Tom Bingham (Lord Bingham of Cornhill) in his wonderful text *The Rule of Law* (Penguin UK, 2011).[2]

Bingham put forward eight principles flowing from the rule of law. Cormacain extracts from those principles six elements that he considers bear on the form of legislation. These elements are set out in the Introduction and fully explored across six chapters.

The elements are accessibility of legislation, prospectivity of legislation, predictability of legislation, intelligibility of legislation, constraints on discretion in legislation and equality before the law in legislation.

The structure of each of those six chapters is to describe the relevant element and then set out principles (there are 32 in total across the book) to be applied in determining the form of legislation that will give effect to that element. Each of those chapters then ends with a conclusion that neatly summaries the chapter.

In expounding the principles, Cormacain suggests drafting practices and techniques which, if followed, support the Rule of Law. For example, chapter five on intelligibility sets out a range of plain language techniques aimed at improving intelligibility in legislation including short uncomplicated sentences, using the active voice, stating the main point first, not front-loading sentences with conditions, adopting a logical structure, using supplementary aids and avoiding nominalisations. All sensible drafting advice.

In Chapter 3, Cormacain derives from the Roman god Janus the term ‘Janus-faced legislation’ to describe legislation that has both a forward and backwards-facing component.

[1] Former Chief Parliamentary Counsel, Victoria, Australia and Law Draftsman, Hong Kong; currently Acting Inspector, Victorian Inspectorate, Victoria, Australia.

[2] Bingham described the core of the constitutional principle of the rule of law as being that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.

While the use of the term "Janus-faced" is not novel, I had not come across it used in this context before. I found it appealing.

There is an interesting discussion of gendered legislation in chapter 7 dealing with equality before the law. The author admits to having been converted to accepting the use of 'they' as a singular pronoun, recognising that "grammatical infelicity is a price worth paying for promoting equality before the law."

While the book is predominantly focussed on UK readers, citing local examples of legislation and highlighting UK accessibility issues and challenges arising from the fact that there are multiple legal jurisdictions within the UK, there is much in the book that is of interest and value to legislative counsel everywhere.

The approach taken by the author seemed to me to be to tell the reader what they are going to be told, then do the telling and then finally tell the reader what they have been told. As an oral teaching approach that is a very effective approach. In a book, it can at times come across as somewhat repetitive and ponderous.

The book has a bibliography covering some 15 pages, reflective of the extensive research that lies behind the book. At times I found myself skipping quickly through the extensively set out products of that research to get to the practical principle. Happily, there is also a clearly presented Index to help guide the reader through the text.

I approached this book not needing to be persuaded that legislative counsel should have the objective of doing all they can to ensure the accessibility, intelligibility, clarity and predictability of the law they write with a view to advancing core elements of the Rule of Law as described by Bingham.[3] Having read the book, and noted the thoroughness with which it explores the link between the form of legislation and the Rule of Law, I have no doubt it provides powerful support to that objective and along the way makes a major contribution to the field of legisprudence.

Cormacain states at paragraph 1.2 that the end goal of the book is legislation that is better quality, easier to understand and that vindicates the values of the Rule of Law. That is a worthy goal and one that would certainly be achieved if the principles set out in it were generally applied.

The focus of this book is the form of legislation (how it is structured, organised and expressed). As such it is highly relevant to legislative counsel. I have no hesitation in recommending it to them as not only an interesting read but a valuable source of guidance and advice.

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[3] See Eamonn Moran, "The Coherence of Statutory Interpretation: Drafting Perspectives" in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation*, (Federation Press, 2019) 50.

Book Review

Executive Legislation, 3rd ed.

By John Mark Keyes, published by Lexis Nexis (Canada), 2021

Reviewed by John P. Maloney[1]

The third edition of John Mark Keyes's work on *Executive Legislation* has quietly come on the market. I have been a fan of the second edition since acquiring a copy at the CALC conference in Hyderabad when we were all younger and more energetic.

When asked to review the third edition, I let my desire to acquire a copy overcome the fact that I do not have the academic background or knowledge to do it justice; I can only come at this work from the point of view of someone who has been drafting statutory instruments in one Irish Government Department for some years. I walk (or, more accurately, stumble) in where angels fear to tread. It struck me that the best approach might be to identify some of the themes explored by the author and offer some comments and reflections in the hope of stimulating debate and in the potential reader some of the curiosity that would cause them to explore the rich veins of knowledge contained in this book for themselves.

This is one of those books that has over the past months been regularly taken down from the shelf and is not only consulted when problems arise but also serves another purpose – to reinvigorate this drafter when one becomes somewhat jaded as occasionally happens.

Executive Legislation is laid out in a logical manner with each chapter broken up into easily digested sections, making the reader's task easier. A welcome element is regular cross-referencing to other parts of the work which allows, even encourages, exploration of the text beyond immediate needs. A subject index to complement the extensive tables of cases and legislation is helpful.

The title "*Executive Legislation*" is an apt description for the subject matter. Other descriptions – statutory instruments, subordinate legislation, secondary legislation – emphasise the fact that such legislation emanates from a power granted by Statute but has the disadvantage of relegating the person who makes the legislation, whether a Minister or other body, somewhere in the wings. The term used by the author firmly puts the law maker at centre stage.

A particularly welcome feature of the work is the extensive use made of material from jurisdictions other than Canada, with reference being made to material relating to Australia, New Zealand and the United Kingdom. I suspect (and hope) that this comparative approach may be expanded in the future.

Statutory Instruments are often seen as in some way incidental to the Statute Book. They are accepted because they are so well established but seen as akin to a poor cousin. Indeed, Brian Hunt, in his book *The Irish Statute Book: A Guide to Irish Legislation* (First Law,

[1] Legislative Drafter, Department of Agriculture and Food, Ireland.

Dublin 2007) describes secondary legislation as an "adjunct" to the Statute Book. This book acts as an important correction to this presumption and places executive legislation in a proper place as an integral part of the Statute Book.

The reasons why statutory instruments are perceived as being of lesser importance may lie in the sheer volume of instruments made in any year, the variety of subject matter covered as well the disparate authorities that may make them. While experience may differ from jurisdiction to jurisdiction, in Ireland, only a proportion of instruments in any year are drafted or settled (a term used to describe examining a draft prepared in a Government Department) in the Office of Parliamentary Counsel to the Government. Most are drafted in individual Government Departments and, increasingly, by various regulatory bodies. This leads to some bizarre phraseology and, in my opinion (especially as I remember – and cringe at the memory of – my own blunders), legislative nonsense; it would serve no purpose to throw cheap shots at particular bodies. One feature is to repeat in an instrument, made under an Act, the terms of the enabling Act. A standard response when this is queried is that the "lawyers" had no problem. Suffice to say that not all lawyers are legislative drafters.

My own perception is that the trend is towards rule making by bodies other than the traditional Government Ministers or Departments and, unless nipped in the bud, this type of nonsense may become endemic. To contribute to preventing such a development, if for no other reason, John Mark Keyes's work should be available widely to public servants and those working for regulatory bodies who are involved in the preparation of executive legislation.

The attitude that executive legislation is of less importance than Acts of Parliament raises the very serious matter of accountability both in relation to the legislature as representatives of the people and through the courts. From the author's research, it appears that parliamentary committees have a valuable role in examining individual legislative documents. The system of formal parliamentary accountability described extensively seems to operate with little variation through the Common Law world. It seems to be more formal than actual with little real control on executive legislative action beyond debate on enabling provisions. As regards individual pieces of executive legislation, either a positive resolution is required before an instrument is made or comes into effect or an instrument, once made, may be annulled by resolution of Parliament or one of the Houses of Parliament within a fixed period. In my experience the former approach ("positive resolution") is limited as to subject matter and usually employed in financial matters. The latter method is more a token bow to democracy or to the primacy of the legislature than a genuine monitor of the law-making activities of the executive. This is highlighted by the fact that since the foundation of the Irish State, a resolution annulling a statutory instrument has only been passed on one occasion. This was in respect of the *European Union (Common Fisheries Policy) (Points System) Regulations 2018*. The annulment of this instrument had more to do with a

wonderful piece of political gamesmanship taking advantage of a minority government's vulnerability than a genuine exercise in supervising the legislative efforts of the executive. I do not have any answers but there is sufficient material in *Executive Legislation* to provide interested lawmakers with sufficient material to inform a productive debate.

I was particularly surprised at the apparent leeway given by Canadian courts to the executive branch in the latter exercising legislative functions. Exercise of legislative functions is much more circumscribed. An individual piece of delegated legislation must be limited to the principles and policies contained in the parent Act. While there are a number of older Acts that have, on their face, a wide-ranging, rather bare, power to make statutory instruments remaining on the Irish Statute Book, their use has largely fallen into abeyance as the view is taken that a general power to make regulations, in the absence of specific guidance, is an excessive delegation of legislative power. As an example, the power to make regulations relating to duties contained in the *Imposition of Duties Act 1957* has lain unused since a Supreme Court judgement in 1991.

The sheer volume of statutory instruments as against the more manageable number of Acts of Parliament makes the task of digesting them difficult. Thus, most of us are by necessity knowledgeable about a very limited area. I, for one, find pension provisions and, indeed, most financial provisions, as comprehensible as Babylonian cuneiform and doubt if my bewilderment is unique. This observation goes to emphasise the importance of a work like *Executive Legislation* in providing an accessible, readable work which may be used by all. This work has a very helpful discussion on financial legislation. In this regard, I would commend the book especially to civil servants who are engaged in preparation of executive legislation. If such a work had been available when I started off on this road, it may have saved me from some of the more avoidable mistakes made over the years, doubtful but one must live in hope.

I read with interest what the author had to say about "soft" or "quasi-" legislation. While I cannot disagree with what is said, I remain uncomfortable with giving such administrative circulars, codes of practice and such-like a legislative character. The sheer volume and variety of such texts seem to me to defy classification and I wonder whether there is any point in giving them a partially legislative character. Is there something to be said for having a definite boundary? The discomfort expressed here is fuelled, to some extent, by developments during the COVID-19 crisis where media reports referred to persons breaching guidelines. Surely, guidelines are merely that and, if it is desired to apply normative rules, that is what should be done. A further example, again derived from media reports, is the treatment of the payment of a fixed payment notice as the equivalent of a criminal conviction. The examples alluded to are, in the totality of things, minor and not without an amusing side. However, they also point to more serious dangers; in any event, let the debate – stimulated by John Mark Keyes's book – continue.

While it is a truism to state that those who engage with legislation decry the relative absence of academic study when compared with other legal topics, this is especially true of secondary legislation. John Mark Keyes's book goes a long way to correcting the relative neglect.

The author has, in my view, been well-served by his publisher. This is a handsome and well produced volume that will grace any shelf; it is within easy reach and I will continue to consult it regularly. I would hope that it is acquired by every organisation engaged in the preparation of legislation. It is my pleasure to congratulate John Mark Keyes on this valued product of his industry and (dare I wish) look forward to the fourth edition.

Book Review

The Construction of Statutes, 7th edition

By Ruth Sullivan, published by Lexis Nexis (Canada), 2022

Reviewed by John Mark Keyes[1]

There are many books on how to understand and apply legislation. Their titles provide insight into how their authors view this topic. Some titles express it very generally in terms of "statute law" or "legislation". Others focus on the "interpretation" of legislation. Alone amongst these books, one employs the term "construction".

In 1974, Elmer Driedger published *The Construction of Statutes* and explained in the preface:

> Construction of statutes therefore involves, first, a correct reading of the statute and then, if any of these difficulties [*ambiguity, obscurity and disharmony*] should arise, finding the solution that would most likely be found by a court should the statute come before it. … The term "construction" is used in this work rather than the term "interpretation". All statutes must be "construed", and only where there is some ambiguity, obscurity or inconsistency in a statute is the term "interpret" fitting.[2]

Driedger's choice of "construction" and the scope of his work were founded on his teaching in a legislative training program at the University of Ottawa. His objective was "to teach students how to read and understand a statute – or conversely, how not to misread a statute – and how to solve a problem if there is one." This practical perspective pervades not only the first edition of his work, but all subsequent editions, including the most recent 7th edition prepared by Ruth Sullivan, which retains "construction" in its title.

Driedger also formulated as the "modern principle of construction" what has arguably become the most frequently cited passage of an academic work in Canadian court decisions:

> Today there is only one principle or approach, namely, 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.[3]

Twenty years later, Ruth Sullivan prepared the 3rd edition. She entitled it *Driedger on the Construction of Statutes*, but modified and expanded its treatment of most issues, including the "modern principle of construction", which she restated as:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose

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[1] Sessional Professor, University of Ottawa.

[2] E.A Driedger, *The Construction of Statutes* (Butterworths: Toronto, 1974) at vii, ix.

[3] Ibid., at 67, citing *Victoria City v Bishop of Vancouver Island* [1921] AC 384 at 387. A CanLII search of the opening words of this principle yields over 4,000 Canadian court decision and over 100 journal articles.

> of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids.[4]

Her reformulation arguably brought greater clarity to Driedger's principle, which does not explain what the "entire context" is and refers to three overlapping elements of legislation ("the scheme of the Act, the object of the Act and the intention of Parliament"). However, her reformulation was largely rebuffed by Canadian courts, notably the Supreme Court of Canada, which in *Re Rizzo & Rizzo Shoes Ltd* referred back to Driedger's formulation in previous editions rather than adopting Sullivan's revision.[5] In her subsequent editions, including the most recent 7th, Sullivan restored Driedger's formulation along with her critique that "it is not self-evident what the principle entails."[6] She particularly identified two of its shortcomings.

The first is "its failure to acknowledge and address the dilemma created by hard cases" [when textual meaning, legislative intent and relevant interpretive norms are vague, obscure or point in different directions].[7] This shortcoming underscores the scepticism about the interpretive methodology developed by the courts – that it is a subjective, result-oriented exercise papered over by appeals to whatever interpretive "rules" support a court's conclusion.[8]

The second shortcoming is not acknowledging that many interpretive cases are not about the meaning of words, but rather about reading down their meaning, reading in more meaning or the relationship between overlapping provisions or between legislation and the common law.[9] In these cases, the text is subordinated to purposive and contextual considerations, often straying rather far from the lexical or grammatical meaning of its words (and arguably from the notion of "interpretation" itself).

Although Canadian courts have not directly addressed the deficiencies Sullivan identified in Driedger's principle, they have brought greater coherence to their analysis of interpretive questions by framing it in terms of three headings – text, context and purposes. Sullivan's 7th edition notes the Supreme Court of Canada's recent acknowledgement of Driedger's principle in its landmark decision on judicial review – *Canada v Vavilov* – where Wagner, CJ (citing Sullivan's 6th edition) wrote:

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[4] R Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Butterworths: Toronto, 1994) at 131.

[5] [1998] 1 SCR 27 at para 21.

[6] R Sullivan, *The Construction of Statutes*, 7th ed (Lexis Nexis Canada: Toronto, 2022) at para 2.01[1].

[7] Ibid. at 10.

[8] Ibid. Perhaps the most famous expression of this criticism is that of Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed" (1950), 3 Vand. L. Rev. 395. See also A Krishnakumar, "Dueling Canons" (2016), 65 *Duke Law Journal* 909.

[9] Ibid. at para 2.01[3].

> [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation…
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> …
>
> [120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision[10]

Framing interpretive methodology in terms of the "text, context and purpose" is now common in decisions of the Supreme Court of Canada and other Canadian courts.[11] It also has currency in the UK,[12] Australia[13] and New Zealand.[14] However, it too leaves many unanswered questions about what should be considered under each heading, how these matters interact with each other, and even whether interpretive analysis should start with the text or its purposes.[15]

Sullivan's 7th edition does not address this tripartite methodology, but rather casts the modern principle in terms of three "dimensions". The first is *textual*, which Sullivan presents in terms of how readers understand written texts, including linguistic conventions and presuppositions rooted in their knowledge, beliefs, values and experience. The second dimension is encapsulated by the notion of *legislative intent* and encompasses the purposes and goals underlying a legislative text. The third dimension is constituted by *legal norms*,

[10] 2019 SCC 6 at para 118-120.

[11] See, for example, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53.

[12] See D. Greenberg, *Statutes for Students* (Daniel Greenberg Ltd.: London, 2019) at 8. Also note that *Craies on Legislation*, D. Greenberg, ed., 11th ed (Sweet & Maxwell: London, 2017), ch. 18 discussing literal and purposive approaches and, at 782, the role of context.

[13] Patricia Lane, "Statutory Interpretation: Caught in the Act" (2017), Sydney Law School Legal Studies Research Paper N. 17/65, available at: http://ssrn.com/abstract=3019646.

[14] See R. Carter, *Burrows and Carter Statute Law in New Zealand*, 5th ed. (Lexis Nexis: Wellington, 2015) at 220-221.

[15] This last matter divided the Supreme Court in a recent case on the interpretation of s. 12 of the *Canadian Charter of Rights and Freedoms*: *Quebec v. 9147-0732 Québec Inc* 2020 SCC 32 at paras 1-18, 49-98.

which are also used to understand or presume legislative intention. The succeeding chapters of the 7th edition variously address these three dimensions.

The textual dimension is addressed in chapters 3 to 8 dealing with ordinary meaning, technical and legal meaning, bilingual and bijural meaning, original meaning, plausible meaning and textual analysis. Chapters 9 and 10 follow addressing purposive and consequential analysis, corresponding to the second dimension. They in turn are followed by chapter 11 on coherence, overlap and conflict resolution, which corresponds to the third dimension on legal norms. Chapters 15 to 18 also deal with legal norms (presumed legislative intent, Constitutional Law, Common Law, International Law).

It is difficult to identify the remaining chapters with a single dimension (and indeed, some of the chapters noted above arguably relate to other dimensions (for example, chapter 4 dealing with legal meaning is not only textual, but also involves legal norms that inform legal terminology). These chapters include other contextual matters (components of legislation, external context, extrinsic aids), the application of particular types of provisions (human rights legislation, legislation relating to indigenous peoples, fiscal legislation) and certain types of application (temporal, territorial and Crown immunity).

In the preface to the 7th edition, Sullivan candidly admits that the processes courts use to interpret and apply legislation "remain largely a mystery, but they are certainly more complex and multifaceted than the compendium of rules described in this book would indicate."[16] It is indeed perhaps too much to expect that she or anyone else would dispel the mystery of how the myriad "rules" of statutory interpretation fit into a methodology based on Driedger's principle, even when structured in terms of text, context and purpose. As one who attempts to introduce students to the interpretation and application of legislation, I must confess to attempting to do in a much more modest way what Sullivan has done in previous editions and continues to do in the 7th edition: "not only state the 'rules' of statutory interpretation, but also to model their application, to exhibit the reasoning courts engage in to justify their conclusions." In this regard, Sullivan's 7th edition, like those of Driedger before her and the four editions she subsequently authored, is an invaluable resource that Canadian courts have repeatedly invoked[17] and deserves to be noted by courts elsewhere.

In addition to updating her text generally, Sullivan has devoted considerable effort to revising the chapters on ordinary meaning (how ordinary meaning is proved), coherence (the treatment of conflict), extrinsic aids (particularly legislative history) and temporal application of legislation. These revisions reflect both emerging scholarship (for example, the concept of "corpus linguistics based on computer analysis of texts"[18]) as well as significant recent court decisions (for example, cases such as *R v Rafilovich* 2019 SCC 51

[16] Sullivan, above n. 6 at vii.

[17] See above n. 3.

[18] Sullivan, above n. 6 at para 3.03[5].

and *R v Khill* 2021 SCC 37 relating to legislative history). Much of the revision to chapter 26 – Temporal Application is organizational. Although it begins with her assertion from the 6th edition that "transitional law has become something of a morass,"[19] its focus at the outset is on the concepts of retroactive and retrospective application found in common law court decisions. Consideration of immediate application (a concept originating in French legal scholarship) is addressed later as a distinct matter.[20]

Ruth Sullivan's 7th edition of *The Construction of Statutes* continues on the path initially blazed by Driedger and subsequently continued in her editions. It is a magnificent work providing a comprehensive and critical account of interpretive methodology. Although its focus is on Canadian case law, this case law is rooted in the common law traditions of legislative interpretation originating in the UK and pursued throughout the Commonwealth as well as in other common law jurisdictions. It is well worth consulting for the resolution of interpretive questions wherever they arise.

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[19] Ibid., at para 25.01[4].

[20] Passages discussing immediate application in the previous edition – R Sullivan*, Sullivan on the Construction of Statutes* 6th ed (Lexis Nexis Canada: Toronto, 2014) at paras 25.23-24 and 25.27-28 – have been moved to paras 25.10ff. in the 7th edition.