

Commonwealth Association of Legislative Counsel

THE LOOPHOLE



December 2024 (Issue No. 2 of 2024)

THE LOOPHOLE

Journal of the Commonwealth Association of Legislative Counsel

Issue No. 2 of 2024

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

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

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

Aleksander Hynnä, Editor in Chief, *The Loophole*

E-mail: loophole.calc@gmail.com

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Editor's Notes

The Loophole, the journal of the Commonwealth Association of Legislative Counsel, is a forum for members of the legislative community to exchange their accumulated wisdom, best practices and hard-won knowledge. This edition marks my first as Editor in Chief. It is an honour and a privilege to publish articles in the field of legislative drafting, written by scholars and practitioners from around the world.

This edition starts with an interview with John Mark Keyes, the outgoing Editor in Chief of this journal and general CALC stalwart. In the interview, Keyes reflects on his tenure as Editor in Chief and on the state of scholarship in the field of legislative drafting.

2024 saw the reinstatement of the in-person CALC Conference, which took place in Trelawny, Jamaica in May. It was an immense pleasure to attend the Conference and to meet with CALC colleagues from across the world. This edition includes five articles based on presentations given at the Conference.

First, Shaquille Newton article addresses the interactions of savings clauses in Caribbean constitutions with the human rights guaranteed therein, including the different interpretations of these savings clauses given by the Judicial Committee of the Privy Council versus the Caribbean Court of Justice. In the next article, I present the results of a survey on the competencies required of drafters, and discuss the implications of the results in light of the advent of artificial intelligence.

Natalie Plumstead and Timothy Roper also address the relationship between drafters and their instructing officers in the third and fourth articles from the Conference. Plumstead considers the drafting process in the context of developing human-centred mental health legislation, reflecting on the need to ensure that lived experience informs legislation in order to ensure the protection of human rights. Roper then casts a critical eye at the role of policy development in the preparation of legislation in Jamaica (though drafters from all drafting offices, no matter how large or small, will undoubtedly find parallels to their own jurisdictions). He offers several recommendations as to how to improve the quality of legislation.

In the fifth article based on Conference presentations, Lucy Marsh-Smith describes the evolution of the legislative revision and consolidation process in the Bailiwick of Jersey.

We include two additional articles in this edition. In the first, Martin Perron and Anna Logie introduce readers to applications of artificial intelligence to the field of legislative drafting, by evaluating the accuracy, explainability and transparency of Rules as Code, generative artificial intelligence and neuro-symbolic (hybrid) artificial intelligence in answering questions on legislative texts. Next, Charlie Feldman comments on a recent case from the New Brunswick Court of Appeal in Canada, in which the Court grappled with the commencement of a statute in circumstances in which the generally applicable rules would have created a significant legislative gap in child welfare protection.

This edition concludes with two book reviews, the first on a South African work entitled *Introduction to Legislative Drafting* by Rassie Malherbe, Anton Meyer and Heinrich Muller, and the second on drafting for the European Union in *Legislative Drafting for the EU* by Helen Xanthaki.

My heartfelt thanks to the authors and editors who worked diligently over the last few months to prepare the following articles and reviews for publication.

I encourage anyone to reach out with any comments that you may have, by sending a message to loophole.calc@gmail.com.

Happy reading.

Aleksander Hynnä
Ottawa, December, 2024

Interview with John Mark Keyes



Abstract

The Loophole sat down for a virtual interview with John Mark Keyes, the outgoing Editor in Chief of this publication. John Mark was Editor in Chief from 2011 to 2024, and is well known to The Loophole's readership as a scholar in the field of legislative drafting and a long-time and active contributor to CALC. He has served as legislative counsel in the Canadian federal Department of Justice, eventually leading the legislative services branch of that department as Chief Legislative Counsel of Canada. He currently works as a Sessional Professor at the University of Ottawa's Faculty of Law, introducing a new generation of law students to the world of drafting.

In this interview, John Mark offers his views on his work with The Loophole and CALC, as well as on the discipline of legislative drafting. The interview has been edited for length and clarity.

You became Editor in Chief of *The Loophole* in August of 2011. What prompted you to take on that role, and what were you hoping to accomplish?

I considered, and I still consider, *The Loophole* to be a really important aspect of CALC and its functioning. Most people do not really get to go to the CALC conferences; if you look at the entire membership of CALC, a small fraction [attends]. *The Loophole* is the window into those conferences for all of these people who don't get to go to the conferences. That was one of the major considerations in terms of taking this on, and why I considered it to be a really, really important role.

Another reason was that it allowed me to engage with people who were writing. I am interested in the things that we publish. So it was a way for me to keep on top of what people are thinking about, are working on across the whole community. Particularly as somebody who [was] getting into the teaching world, I felt it was an important link into the

drafting world that, two years [after becoming Editor in Chief], I was leaving when I retired from the Department of Justice. It was a really good way to keep in touch with the drafting community around the world.

Those are the two main reasons that I would advance.

And were those reasons borne out?

Yes. I'm fairly satisfied with what I accomplished in terms of getting things into print and getting them published. I usually tried to do at least two issues a year, sometimes three, and I was able to manage with all of the other things that I was doing.

And it's a great way [to keep] in touch with people around the world, and I appreciate the interactions that I've had with authors. Universally, I would say that they were positive interactions, even when I would send back a manuscript with some questions and comments on it. People were very receptive to those comments and very willing to try to address them. All in all, I found it a very positive working relationship with the authors that I was dealing with.

Have you noticed any changes in the types of articles being submitted to *The Loophole* over the course of your tenure? Has there been anything else that's changed from 2011?

I think the types of articles, in general terms, have remained the same. You have articles dealing with the practice of drafting and running drafting offices and managing things. Articles that deal with the role of legislative counsel, that's a common subject. And then articles dealing with interpretation, [there are a] significant number of them because what we do ultimately ends up in the courts often. And so the general tenor of articles has not changed a whole lot.

What has emerged? Quite distinctly, articles dealing with laws as code and artificial intelligence, [which] certainly in the last three or four years [have] become far more prominent. It's a reflection, I think, of how those things are affecting the drafting of legislation and in fact the nature of legislation itself. It's fundamental to what's happening. It's not just our role as drafters, it's the role of the product itself when it gets out there, how people are using it and how it's being transformed to a great extent in the way it's being used. If you go back 10 years ago, there were no articles talking about this at all, whereas today I suspect you probably [have] some articles in the upcoming issue on it.

And if I look back on the more recent issues, there were lots of articles on it. It's certainly a feature of interest to modern drafting.

We have a couple of papers in this [issue] that touch on AI. One deals with it in depth,¹ and there were certainly a couple of presentations at the last CALC

¹ See M. Perron & A. Logie, "Rules as Code vs. ChatGPT: Lessons from Converting Canadian Federal Legislation into Code using Blawx", below.

conference that dealt with it. So it absolutely is becoming something that no one can avoid in the field of legislative drafting.

One of the challenges I found with articles [on new technology], especially the ones dealing with laws as code, is trying to get them at a level that I think most of our readers can understand. It's pretty easy to do a deep dive into this and start speaking in a world that only computer scientists really understand. That's actually one of the challenges of these articles — trying to deal with the issues, but in a way that is accessible and relates to the practice of people who are reading them.

I'll be interested to see your comments on [the Perron and Logie] article. I think [the authors] have done a very good job.

Somebody else who has done a good job at that is Guzyal Hill in Australia. [In] her article,² she looked at few kinds of concrete examples of using ChatGPT and some of the others to put together legislation. It fundamentally demonstrated, in a concrete way, what these pieces of software do. It helped to make it more real for people in the drafting world.

You've mentioned the Hill article. Are there any other notable *Loophole* articles that stick out?

There [are] a couple. One of them was Elizabeth Gardiner's article about improving the statute book.³ It strikes a note with me, as something that I think is at the core of what we're doing as drafters: that we're not just trying to translate whatever the policy is into words and a text, we're also paying attention to the overall statute book. Janet Erasmus had said that we're the keepers of the statute book.⁴ I would look at Elizabeth's article, and Janet's earlier article on keepers of the statute book, as really important articles to try to encapsulate an aspect of drafting that maybe people are not too aware of. And yet I think it's just absolutely fundamental, and it's been fundamental since the whole discipline of drafting began to emerge in the middle of the 19th century.

Lord Thring wrote some of the initial books on drafting. He's famous for saying that a drafter needs to [regularly] take a look at the *Interpretation Act*. It's the drafters' Act, and [it] really encapsulates that notion of a statute book that is a whole. And who pays attention to the *Interpretation Act*? Who's responsible for it? The drafters.

So Elizabeth Gardner's article and Janet Erasmus' article on the same topic would stand out to me as a couple of the most important articles that that I've published.

² G. Hill, "Legislation for AI, Legislation with AI: Round No 1 ChatGPT v Australian Law Council" (2023) 3 *The Loophole — Journal of the Commonwealth Association of Legislative Counsel*.

³ E. Gardiner, "Improving the Statute Book: a Parliamentary Counsel's Viewpoint" (2023) 1 *The Loophole — Journal of the Commonwealth Association of Legislative Counsel*.

⁴ J. Erasmus, "Keeper of the Statute Book: Lessons from the space-time continuum" (2010) 1 *The Loophole — Journal of the Commonwealth Association of Legislative Counsel*.

What impact has being Editor in Chief of *The Loophole*, and your involvement in CALC more generally, played in how you think about the role of legislative counsel?

It's helped me maintain a lively awareness of what is going on in the drafting world and particularly the challenges that I think are out there. I don't think there's ever been a more challenging time to be a legislative council. Now maybe everybody says that, all through the ages. But I see some basic threats. Some of them are rooted in a complete misunderstanding of what drafting is. But some of them are also rooted in a failure to appreciate what drafting can bring to the creation of legislation and an assumption that policy-making and policy development [are] drafting.

That assumption really exists in many other places outside of the British tradition of drafting. In the United States, drafting is largely considered to be a matter of policy-making. Last year, I was down [at] David Marcello's legislative drafting institute in New Orleans. He runs this for two weeks in June every year, invites people from all over the world and the [United] States to come and hear people talk about drafting. Well over half of the presentations at that conference are policy presentations: they're diving into the particular policy area, they're talking about how we did this and that to deal with the policy issues. Of course there's a legislative angle, in the sense that some of the things they did were legislation, but it wasn't really involved with how you transform that policy into the legislation. It was just saying, well, here was the policy issue and this is what we did with it, the challenges of trying to write that into legislation. I've developed an awareness through my contacts in *The Loophole* of that challenge.

The topic of the role of drafters is a constant topic in the articles and in the conferences. How do you manage clients? How do you deal with clients? What is your role in relation to the clients? We're paying so much attention to that because there is a lack of understanding out there and there's a need for trying to develop strategies for making sure that you can play the role that you think you need to play as a legislative counsel.

The depth of your experience in legislative drafting goes well beyond being Editor in Chief of *The Loophole* and CALC. You've worked as legislative counsel, as Chief Legislative Counsel of Canada (the head of a large drafting office) and you've written seminal scholarly articles and books. What changes in the discipline of legislative drafting have you seen over the course of your career?

In the practice of drafting itself, [I would say] computer technology. When I started drafting, there were no computers in the meeting rooms. When I went to meet my clients, I would take notes, handwritten notes, I would go back to the office, I would transcribe these things on to a manuscript, a paper script, and I would give it to a secretary. I started that long ago. I was in a paper world. The height of technology was a photocopier. We didn't have to make carbon copies anymore! We could just take it to the photocopier.

Computers arrived not long after I arrived in legislative services in 1984. The arrival [of computers] transformed things immeasurably, and it's transformed the expectations around

deadlines as well. In terms of drafting practice, you have to do things a lot more quickly than you ever did before. The expectations are there, and in theory the technology is there. You don't have to wait for a secretary to input [things]. You can turn it around in the blink of an eye. The technology that gave us more time is gone and instead we have technology that minimizes the time. Those technology changes have resulted in changes in the discipline.

Another change in the discipline that I shouldn't overlook is a greater awareness of producing a readable text, and paying attention to some of the ideas that motivate plain language. Although the complexity of what we have to draft presents real challenges in terms of those objectives, there are nevertheless things that you can learn from them. Things like paragraphing.

[Paragraphing] is actually not a plain-language discovery. It's a drafting discovery from probably somewhere in the early 20th century, when you start to see paragraphing showing up in legislative text. And it's a brilliant tool to make complex ideas work more effectively and become more readable. It's a technique that's driven by a greater awareness of your reader. That's actually something that goes way back in drafting practice.

Where did marginal notes come from? Who invented them? People who were concerned about the readability of these mammoth blocks of text, these long sentences that went on for maybe more than a page. How do you make that a little more accessible? Well, we're going to put this little summary in the margin to give you an idea of what this is all about. Then when you're reading through this legislation, you wouldn't have to read the whole block of text. Just read the marginal note to see is there something likely to be something here that [you] need to know. If the marginal note is saying something that's [of] no interest to you, you move on.

That's reader awareness, trying to write something so that the readers will understand it more easily. That's challenging, given the breadth of possible audiences out there. But there are certain things that will benefit all readers, in terms of readability and the things that come out of plain-language drafting. We should be implementing those things at least.

What topics would you like to see scholarship and commentary on legislative drafting address in the future? What areas are ripe for inquiry?

From time to time in my teaching, I come across really interesting ideas and say somebody should write a paper about that. They're usually fairly neat kinds of questions about interpretation, about how to facilitate interpretation or about the other issues that are connected with lawmaking, particularly in delegated legislation. Issues related to judicial review. Those sorts of things.

In very general terms, I think scholarship should be looking at systemic questions. This is a real challenge for modern scholarship, at least as I see it from the university, because graduate students all seem to be interested in just diving into particular policy areas, particular subject areas, as opposed to doing research that cuts across the legislative system,

things that deal with the statute book as a whole. There's a need for scholarship on those kinds of things.

Any predictions for how the field of legislating drafting will develop in the future?

I'm not going to make predictions, I'm going to express wishes and hopes.

My hope is that there continues to be a role for people who do the things that drafters have always done, which is try to understand what the policy is, to figure out a good way to implement that policy in legislation. I don't think [drafting] is ever going to be an automated process because it's about life, human behaviour. I don't think machines are ever going to be able to completely predict what human beings are doing, and that's a good thing. Ultimately the legislation has to work in the real world, in the world of people. It doesn't just have to work in the world of computers. I see a vital role for a human drafter in all of that.

And what role would you like CALC to play in that development?

I hope that it continues to play the role that it has been playing, [of] bringing together people who have a common interest in a field that is not well known and that requires real skills that can be developed and can evolve over time. It's about nurturing the community of drafters and legislative counsel [by] bringing them together, so that they can talk about what they're doing and and they can move forward in terms of the ongoing development of that craft.

Historically, [CALC's] role has been to organize conferences that take place every couple of years around the world. It's that global reach [that] is really important for CALC. It shouldn't just be focusing on a few jurisdictions, particularly because there's diversity across the world in the way drafting is done. It's useful to have a conversation about the diverse ways in which things are done. Maybe we will move towards a globalization of the craft, but there are some things that will never be globalized because there are fundamental differences in jurisdictions around the world and those differences have to be reflected in legislation.

It's about having a global conversation about these things and trying to bring people together to have that conversation. With the advent of the Internet and web pages and video-conferencing, the capacity has never been greater for CALC to take advantage of all of these tools to bring people together. [CALC] had one conference during COVID, which was a virtual conference. It was challenging, I think, mainly because of the time-zone issue. But it probably brought far more people together than ever would have been brought together at an in-person conference. [Holding a virtual conference] allows for people to participate live online [and] for recordings to be made for people to participate afterwards. So it's taking the core of what *The Loophole* was, which I saw as a mechanism for making those conferences accessible to the wider membership. It's a mechanism for doing that on a far grander scale than was ever possible in the paper versions of *The Loophole*. That's one thing I would strongly encourage. Because the technology is there.

The Loophole *extends its thanks to John Mark Keyes for sitting down for this interview and, more importantly, for his 13 years as Editor in Chief.*

The Effectiveness of the “Bills of Rights” in Commonwealth Caribbean Constitutions in Light of Savings Law Clauses

Shaquille K. Newton¹



Abstract

Commonwealth Caribbean Constitutions contain what are commonly referred to as “Bills of Rights”, which enshrine a minimum guarantee of basic human rights to the citizen within these jurisdictions. Also present in Commonwealth Caribbean Constitutions are savings law clauses, which save and immunize laws existing before the enactment of these constitutions from being declared unconstitutional. This article uses Dr. Maria Mousmouti’s “effectiveness test” as the criteria to assess the effectiveness of these “Bills of Rights” in the light of savings law clauses and considers how courts have applied different interpretative rules to those clauses.

Introduction

In the two decades between 1962 and 1983, twelve Caribbean states gained political independence from the United Kingdom, with the Colonial Office (later the Foreign and Commonwealth Office) closely guiding the negotiations over the content of new constitutions and supporting the drafting process. In *Hinds v R*,² Lord Diplock, commenting on the constitutions of the Commonwealth Caribbean, stated “there can be discerned a common pattern of style and draftsmanship which may be conveniently described as the Westminster model.”³ These post-independence constitutions have become known as

¹ Shaquille K. Newton, LL.B. (Hons.), LL.M. (UWI), LL.M. (Dist.) (Lond.), LEC, Attorney-at-Law is Parliamentary Counsel (Ag.) in the Office of the Chief Parliamentary Counsel of Barbados. He was awarded the LL.M. in Drafting Legislation, Regulation and Policy with Distinction from the Institute of Advanced Legal Studies, University of London. The views and opinions presented in this article are those of the author and do not necessarily reflect the views and opinions of any entity which the author represents. Email: shaquillenewton1811@gmail.com.

² *Hinds v R*, [1977] AC 195 [*Hinds*].

³ *Hinds*.

“Westminster model constitutions” as they are in all their essentials “a written version of the constitutional arrangements evolved in the United Kingdom over many centuries.”⁴ Whilst it is accepted that these constitutions largely codified the structure and organization of government as existed in the UK, the constitutions introduced the doctrine of constitutional supremacy and provided for a “Bill of Rights” enshrining a minimum standard of fundamental rights to the citizenry.

Two prevailing views exist as to the significance and purport of the post-independence constitutions. Ralph Carnegie asserts that these constitutions gave rise to a legal revolution within the newly independent states,⁵ whilst Sir William Dale argues that the new constitutions did not represent an abrupt metamorphosis into a state of freedom.⁶ Irrespective of which view one subscribes to, it is indisputable that upon independence, pre-existing laws were saved by virtue of savings law clauses. For practical purposes, the common law and legislation extant at the dates of independence of the jurisdictions were preserved by these clauses. Not only did they save the pre-existing laws but they prevented them from challenge on the basis of being unconstitutional. These savings law clauses have proven problematic, and a tension exists between the Bill of Rights and the saved pre-existing law.

Demerieux correctly asserts:

A cursory examination of the statute books of the West Indian jurisdiction reveals a host of laws that could run foul of the Constitution if approached from the view that rights are to prevail over existing law.⁷

This supports the contention that the savings law clauses contained within the Constitutions of the Commonwealth Caribbean render the provisions of these Constitutions’ Bills of Rights ineffective. This article will first examine savings law clauses in their normative nature and their operation in the Constitutions of the Commonwealth Caribbean. Secondly, Mousmouti’s “effectiveness test” will be applied as the criteria to analyze the Bills of Rights. Thirdly, using case law, it will be shown how a literal interpretation of these savings law clauses rendered the Constitutions ineffective and necessitated the Courts to adopt a purposive interpretation of the clauses to allow to the Constitutions to be effective. Rather than these savings law clauses rendering these Constitutions ineffective, it is now time for them to be removed from the Constitutions.

⁴ Constitutional Commission of Trinidad and Tobago, *Report of the Constitution Commission* (1974) at p 11, para 24.

⁵ R. Carnegie, “The Approach of Independence for the Associated States: A Constitutional Law Perspective” (1971) 4 *Bulletin of Eastern Caribbean Affairs* 8.

⁶ W Dale, “The Making and Remaking of Commonwealth Constitutions” (1993) 19 *Commw L Bull* 765.

⁷ M. Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (Faculty of Law Library University of the West Indies, 1992) at 53.

Savings Provisions

Thornton states that “the function of a saving provision in legislation is to preserve or ‘save’ a law, a right, a privilege or an obligation which would otherwise be repealed or cease to have effect.”⁸ The Constitutions of the Commonwealth Caribbean contain one or both of the two types of savings law clauses, namely the special savings clause and the general savings clause. The *Constitution of Barbados* is an example of a constitution that contains both types of the savings law clauses and so will be used for the purposes of analysis.

Section 15(2) of the *Constitution of Barbados* provides for a special savings law clause, which reads:

(2) Nothing contained in or done under the authority of any law shall be held to inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966.

Section 26(1) of the *Constitution of Barbados* provides for a general savings law clause, which reads:

(1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provisions of sections 12 to 23 to the extent that the law in question —

(a) is a law (in this section referred to as “an existing law”) that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;

(b) repeals and re-enacts an existing law without alteration; or

(c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not so previously inconsistent.

In summary, the special savings law clause immunizes punishments existing prior to the enactment of the constitution or earlier appointed date from judicial review on the ground that it is inhuman and degrading.⁹ The general savings law clause purports to preclude judicial scrutiny of laws in existence at the date the constitution came into force for their conformity with the chapter protecting fundamental rights and freedoms.¹⁰ The consequence of both these savings law clauses is that laws in existence before the enactment of these Constitutions, which are clearly in violation of the provisions of the Bill of Rights, cannot be deemed unconstitutional and remain in force (e.g., laws allowing public flogging, which are in contravention of the right not to be subjected to torture or to inhuman or degrading

⁸ G. Thornton, *Legislative Drafting*, 5th ed (Bloomsbury, 2013) 473.

⁹ T. Robinson, A. Bulkan & A. Saunders, eds, *Fundamentals of Caribbean Constitutional Law*, 2nd ed. (Sweet and Maxwell, 2021) at 262.

¹⁰ Robinson et al. at p 264.

punishment or other treatment). Moreover, with respect to special savings clauses, even if a pre-existing law that is at variance with the Bill of Rights is repealed, it may be re-enacted and still protected from being found unconstitutional. It is axiomatic that the savings law clauses contained in these Constitutions deviate from the normative nature of savings provisions in the discipline of legislative drafting. Savings provisions simply save the law but do not grant the saved law immunity from judicial scrutiny for constitutionality or other reasons.

The Effectiveness Test

“Effectiveness”, used as a criterion for the evaluation and assessment of legislation, is a concept in search of a definition. Nonetheless, it is possible to discern the scope and elements of effectiveness as criteria for evaluating legislation. Mousmouti opines, “effectiveness is therefore a factual criterion for measuring the quality of legislation or its real-world outcome and real impact on society.”¹¹ In this statement she has conceptualized the effectiveness test. She further writes:

An effective law should (i) foresee in advance the main expected impacts of the legislation and take them into account in the drafting and formulation process (through impact assessments or other methods of ex ante evaluation) (ii) state clearly its objectives and purpose (iii) provide for necessary and appropriate means and enforcement measures that will allow the piece of legislation to produce the states objectives in real life (iv) assess and evaluate real-life effectiveness in a consistent and timely manner. These four simple criteria, when brought together across the life cycle of a rule, can give us an indication of the effectiveness of a legislative text. This will be called from now on the “effectiveness test”.¹²

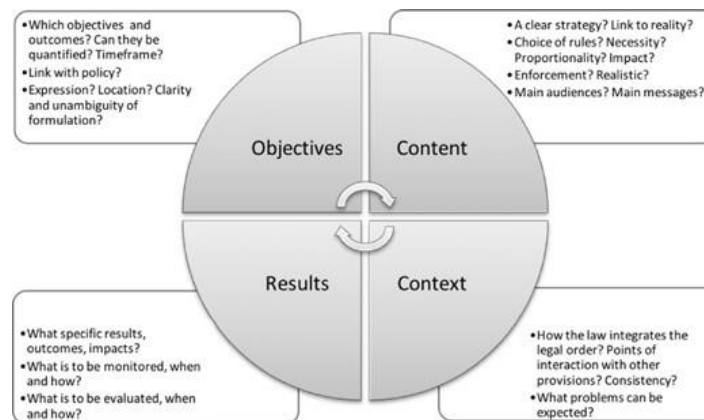


Figure 1: A diagram of Mousmouti’s effectiveness test

¹¹ M. Mousmouti, “Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Law Making” (2018) 9 *European Journal of Risk Regulation* 445 [Mousmouti 2018]

¹² Mousmouti 2018.

I will apply Mousmouti’s four limbs of the effectiveness test to Bills of Rights to illustrate how savings law clauses render them ineffective.

Purpose of the Commonwealth Caribbean Constitutions’ Bill of Rights

The main objective of the first step of the effectiveness test is to explore the purpose in relation to the underlying problem, policy and the objectives of the law and ensure that it provides a meaningful link and benchmark for what the law aims to achieve.¹³ The role and purpose of constitutions have and continue to be the subject of much academic study; at this juncture it is possible to identify universal purposes and functions of constitutions. In their normative nature modern written constitutions primarily set out the political and governmental organization and machinery of the state, and in most a separate and revered section termed the “Bill of Rights” defines citizens’ rights.

Whilst none of Commonwealth Caribbean Constitutions contains express purpose or objectives clauses, it is possible to identify from analysis of these Constitutions’ preambles and the opening sections of the Bills of Rights that a major purpose of the Constitutions was that of granting to citizens a basic set of human rights. First, the preambles of the Commonwealth Caribbean Constitutions have declaratory statements which is indicative that the Constitutions recognize human rights norms and are concerned with their protection. The language of various preambles refers to “unshakeable faith in fundamental human rights and freedoms”,¹⁴ the “desire to establish a framework of supreme law within which to guarantee their inalienable human rights and freedoms”¹⁵ and the belief in the “dignity of human values and that all men are endowed by the Creator with equal and inalienable rights, reason, and conscience.”¹⁶

Secondly (with the exception of Trinidad and Tobago, whose Bill of Rights is modelled on 1960 *Canadian Bill of Rights*¹⁷), the Bill of Rights of the Commonwealth Caribbean Constitutions were modelled on the 1960 Nigerian Constitution,¹⁸ which had used 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (“ECHR”) as its template. The opening section of these Bills of Rights starts by listing the rights to which the citizen is entitled and continues with the explicit statement of purpose of the Bill of rights, which states:

The following provisions of this Chapter shall have effect for the *purpose* of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions.

¹³ M. Mousmouti, *Designing Effective Legislation* (Edward Elgar Publishing, 2019) 121 [Mousmouti 2019].

¹⁴ See Constitutional Preambles of Barbados, Belize, Trinidad and Tobago.

¹⁵ See Constitutional Preamble of Antigua and Barbuda.

¹⁶ See Constitutional Preamble of Grenada, St. Lucia, and Trinidad and Tobago.

¹⁷ S.C. 1960, c.44.

¹⁸ 1960 Constitution of the Federation of Nigeria.

From this analysis it is clear that the purpose of the Bill of Rights is to recognize and protect the human rights of the citizenry of these jurisdictions.

Content of the Commonwealth Caribbean Constitutions 'Bill of Rights

Content reflects the legislative solution and the internal mechanics of the law which will determine how the law will achieve its expected results.¹⁹ The purpose of the Caribbean Constitutions' Bills of Rights being to recognize and protect the human rights of the citizens, their content must now be assessed for its ability to realize the intended purpose.

As previously stated, the Bill of Rights modelled from the 1960 Nigerian Constitution commences with the opening section, followed by a list of detailed provisions granting rights. The sections that follow set out the civil and political rights, including those of life, liberty, the right not to have property acquired without compensation, etc. At the end of each of these rights is a clause referred to as the "limitation clause", which lays conditions under which the rights may be limited or derogated from. Following the list of detailed rights is the "redress clause", which gives standing to aggrieved persons to approach the Courts to seek relief for breach of the detailed rights and allows the courts to engage in judicial review. The redress clause may aptly be considered the enforcement mechanism to protect human rights.

After the redress clause are provisions to cater to periods of emergency which suspend the operation of the Bill of Rights. Following this is the controversial savings law clause and finally the Bill of Rights concludes with an interpretation section which defines various terms within the Bill of Rights. It is demonstrable from an examination of the Bills of Rights that they codify what are now considered "first generation human rights"²⁰ and bring international human rights norms into these jurisdictions' municipal legal systems.

Context

Every new piece of legislation, following its enactment, becomes part of the legal system.²¹ As such, context is an assessment of how the law fits and contributes to the legal system. Belle Antoine asserts, "one of the most important functions of the Constitution in the Commonwealth Caribbean, and certainly the most popular, is its role in defining and protecting fundamental human rights."²² Having accepted that the Constitutions mainly codified the principles of governance that existed in the United Kingdom, the provisions of the Bill of Rights are the main innovative aspect of the Constitutions and introduced major changes to the legal systems of the Commonwealth Caribbean jurisdictions.

For the first time human rights were explicitly recognized and granted to the citizenry of these jurisdictions. Moreover, whilst these Constitutions, via their texts, did not recognize

¹⁹ Mousmouti 2019 at 14.

²⁰ First generation human rights are civil and political rights, e.g., the right to life, equality before the law, freedom of religion etc.

²¹ Mousmouti 2019 at 15.

²² R.-M. B. Antoine, *Commonwealth Caribbean Law and Legal Systems*, 2nd ed (Routledge, 2008) 99.

the system of slavery upon which these societies were founded, the rights contained within these Constitutions are largely representative of international human rights norms and values emanating from the *Universal Declaration of Human Rights*.²³ The Preamble of the UDHR recognized that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”. In the light of the enslavement of African peoples and the historical human rights atrocities that occurred in these jurisdictions, the inclusion of a Bill of Rights in these Constitutions is significant as it is a direct attempt to prevent violations of the human rights of the peoples of these jurisdictions.

It is ironic that, in the drafting of these Constitutions, much credence was given to the inclusion of a set of human rights norms encapsulated in the Bill of Rights and yet the drafters of the Constitutions crafted provisions that allows laws in conflict with human rights to remain on the statute book and to be insulated from challenge. Thornton asserts in his “analysis stage” of the drafting process that legislative proposals should be subject to careful analysis in relation to existing law, special responsibility areas, and practicality. The crafting of these savings law provisions and the Bill of Rights of these constitutions touched and concerned all the areas which Thornton was at pains to highlight. Had the legislative counsel responsible for drafting these Constitutions engaged in better analysis and highlighted the implications of these savings law provisions, this dichotomy which now plagues these Constitutions would not have occurred. McLeod agrees with Thornton and notes:

In drafting a savings provision, it is particularly important that drafters are able to identify the gaps in their instructions which the instructing department would have plugged if it had appreciated the need to do so and ask the appropriate questions.²⁴

It is understandable that drafters needed to find a legislative solution which allowed for the smooth continuance of the legal regime on the independence of these jurisdictions. However, to the contemporary and trained legislative drafter, it is evident upon analysis that the saving law clauses undermine the design of the legislative solution to protect human rights.

Results

When a law is enacted, it is no longer a conceptual exercise. Information on the impact of the law is necessary to evaluate its performance and determine the achievement of the desired objectives.²⁵ Examination of case law relating to legislation is one means of assessing that impact. An examination of the case law and jurisprudence surrounding the Bill of Rights is the main, and perhaps the only, way to assess their potency in protecting human rights. The Courts are responsible for the enforcement of the Bill of Rights, and through this enforcement the Bill of Rights may realize its purpose.

²³ *Universal Declaration of Human Rights* (adopted 10 December 1948 UNGA Res 217 A(III) [UDHR]).

²⁴ I. McLeod, *Principles of Legislative and Regulatory Drafting* (Hart, 2009) at 98.

²⁵ M. Mousmouti, “The ‘effectiveness test’ as a tool for law reform” (2014) 2:1 *IALS Student Law Review* 4.

The case law reveals that the Bill of Rights has the capacity to yield very different results depending on the Courts' interpretation and construction of its provisions. The Judicial Committee of the Privy Council (JCPC) previously served as the final appellate court for all the jurisdictions of the Commonwealth Caribbean. Presently five jurisdictions — Barbados, Guyana, Belize, Dominica and Saint Lucia — have made the Caribbean Court of Justice (CCJ) their final appellate court. The JCPC and the CCJ have taken very different approaches to the interpretation of the savings law clauses and in general to constitutional interpretation. Legal scholars such as O'Brien have examined the jurisprudence emanating from these Courts and have conceptualized their approaches to interpretation using their own terminology.²⁶ The JCPC has utilized the "literal (or plain meaning) rule" of statutory interpretation, whilst the CCJ has utilized the "purposive approach".

The literal rule of interpretation asserts that, if an enactment is grammatically capable of only one meaning (whether generally or in relation to the facts of the instant case) and, on an informed interpretation, the interpretative criteria do not raise any real doubt as to that meaning, the enactment is to be given its grammatical meaning.²⁷ *DPP v Nasralla*²⁸ was the earliest case decided by the JCPC concerning the interpretation of the "general savings law clause". Section 26(8) of the Constitution of Jamaica,²⁹ at the time of the adjudication of *DPP v Nasralla*, contained the "general savings law clause".³⁰ Here, Lord Devlin took a literal approach to interpretation of the savings law clause and concluded that existing law also meant the common law, and that the savings law clause by its natural and ordinary meaning shielded all law which existed prior to the enactment of the constitution. Moreover, in supporting his conclusion that the Bill of Rights was solely prospective in nature, Lord Devlin oddly reasoned that the fundamental rights contained in the Jamaican Constitution were already secured by existing law.

The literal interpretation of the Constitution was followed in a plethora of cases and these savings clauses continued to shield existing law from being *ultra vires* of the Constitution. Thus it is clear that a literal interpretation severely inhibits the Bill of Rights' capacity to protect human rights by having them apply only to prospective laws, and where prospective laws are of the same effect as existing or repealed laws, these laws too are shielded. Because the body of existing law covers to such a large degree law and human rights violations at variance with the rights contained in these Bills of Rights, this literal interpretation of the savings law clauses as indicated by the case law does little to protect human rights.

²⁶ D. O'Brien, "The Interpretation of Commonwealth Caribbean Constitutions – Does Text Matter" in R. Albert, D. O'Brien and S.-S. Wheatle, eds, *The Oxford Handbook of Caribbean Constitutions* (Oxford University Press, 2020).

²⁷ D. Bailey & L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 7 ed (LexisNexis, 2020) at p 427.

²⁸ *DPP v Nasralla*, [1967] UKPC 3.

²⁹ 1962 Constitution of Jamaica.

³⁰ Section 26 of the 1962 Constitution of Jamaica is now repealed by *The Charter of Fundamental Rights and Freedoms* (Constitutional Amendment) 2011, Act 12 of 2011.

The CCJ, recognizing the tension between existing law and the purpose of the Bill of Rights and the effect of a literal interpretation of the savings law clauses essentially being a loophole to allow the jurisdictions to rely on existing law to perpetuate violations of human rights, has sought to remedy these defects by utilizing a purposive approach to interpreting the Bill of Rights. The purposive approach asserts that in construing an enactment, the Courts should aim to give effect to the legislative purpose. A purposive construction may accord with a grammatical construction or may require a strained construction.³¹

The purposive approach was employed in the case of *Nervais v R*³² which began the whittling away of the savings law clauses as a shield to review existing laws. The CCJ stated its duty “to give effect to the interpretation which is least restrictive and affords every citizen of Barbados the full benefit of the fundamental rights and freedoms.” In this instance, the Court relied upon the opening section of the Bill of Rights and found that it was not subject to the savings law clauses. This allowed the Court for the first time to find that existing law was in breach of the Bill of Rights (in this instance the right to life). In *McEwan*,³³ in assessing whether existing law that made cross-dressing a criminal offence was in breach of the Bill of Rights, namely, equality and freedom of expression, the CCJ squarely refused to be constrained by a literal interpretation of the savings law clause and stated:

Law and society are dynamic, not static. A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual’s fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest.³⁴

Consequently, a purposive approach ignores the savings law clauses and allows the Bill of Rights to fully achieve its purpose and produce results that protect human rights. Nonetheless, the approach of the CCJ has been subject to criticism that it has pushed the boundaries of purposive construction to the extreme.

Conclusion

From the above it is discernible that the Bills of Rights of the Commonwealth Caribbean Constitutions have a common origin and as such were expected to operate in a similar manner. This is no longer the situation depending on whether the JCPC or the CCJ is the jurisdiction’s final appellate Court. Applying Mousmouti’s effectiveness test reveals that in jurisdictions which utilize the JCPC as the final appellate Court, the savings law clauses

³¹ Bailey & Norbury at p 376.

³² *Nervais v R*, [2018] CCJ 19 (AJ).

³³ *McEwan v. Attorney General of Guyana*, [2018] CCJ 30 (AJ).

³⁴ *McEwan* at para 41.

render the Bill of Rights ineffective, whereas in jurisdictions which utilize the CCJ as the final appellate Court, they no longer do so.

This situation is untenable in the light of these jurisdictions' commitment to the harmonization of law with each other, and the move towards complete regional integration. Most jurisdictions of the Commonwealth Caribbean are subject to the literal approach by the JCPC, and with no sign of the JCPC intending to adopt a purposive approach to interpreting the Bill of Rights, this important area of the law within the region will remain unharmonized.

Moreover, despite the CCJ being well-intentioned in protecting human rights, this manner of statutory interpretation and construction arguably usurps the role of the jurisdictions' Parliaments to make law and opens the door for deviation from the well-established principles of statutory interpretation and construction. Upon sober reflection of the circumstances in which these savings law clauses were created, the problems they present to protecting universally accepted human rights norms, and the judicial activism that the CCJ has resorted to in an effort to modernize the law, immediate legislative reform must be undertaken to resolve this legal conundrum. In conclusion, the Parliaments of the Commonwealth Caribbean, particularly those jurisdictions which retain the JCPC as their final Appellate Court, must find the political impetus to repeal these draconian and oppressive savings law clauses.

Legislative Counsel Competencies: Present and Future

Aleksander Hynnä¹



Abstract

What are the competencies expected of legislative counsel? To answer this question, the Legislation Section of the Department of Justice Canada conducted a survey of legislative counsel and instructing officers. Respondents were presented with 21 competencies that might be expected of counsel in running a drafting file, and were asked to rate each competency from a scale of “not at all important” to “very important”, and to identify and rank their five most important competencies.

The survey results demonstrate the present reality of legislative counsel, in pointing to four core competencies that were both highly rated and ranked: ability to work in teams, drafting acumen and judgment, legal knowledge — construction of statutes, and writing skills. Five more competencies were identified as second-tier competencies.

The paper then reflects on the future of legislative drafting by considering the results of the survey in light of the potential impact of artificial intelligence on our discipline. The core competencies and second-tier competencies are evaluated by comparing them to the tasks at which AI systems are predicted to excel. The paper concludes by considering the

¹ General Counsel, Legislation Section, Department of Justice Canada. The contents of the paper do not necessarily represent the views of the Department of Justice Canada. I wish to thank Julie Ladouceur, Arina Joannis and Sandra Markman for their thoughtful comments on earlier versions of this paper, and the Research and Statistics Division of the Department of Justice for their advice and work in compiling the results of the survey.

competencies that legislative counsel may wish to highlight in the future to demonstrate their continuing relevance.

Introduction

In keeping with the theme of CALC's 40th conference of "common challenges past, present and future", in this paper I will focus on the present and on the future of legislative drafting. It offers a snapshot of the present by reporting on a survey conducted by the Legislation Section of the Department of Justice Canada² to elicit respondents' views on legislative counsel competencies. After reviewing the survey results, I will then consider what those results may mean for the future practice of legislative drafting in light of the future impact of artificial intelligence.

The Survey

The Legislation Section of the Department of Justice Canada conducted a survey of legislative counsel working in the Section and of their instructing officers, to determine respondents' perceptions of what constitute the most important competencies of legislative counsel.

General Description of the Role of Legislative Counsel

Legislative counsel are responsible for preparing the text of primary and secondary (or delegated) legislation. They convert policy instructions into legal rules by embodying it in texts that will produce the desired result when applied by legal actors.

Legislative counsel stand at the nexus of policy, law and communication. Like all lawyers, they rely on a body of general legal knowledge. But they also have specialized knowledge relating to the law of statutes, as well as skills in writing and in conceptualizing and structuring legal rules. They work with instructing officers to identify and organize the elements of the policy to be turned into law, and regularly must return to instructing officers to draw out policy elements that have not yet been articulated.

Description of the Legislation Section of the Department of Justice Canada

The Legislation Section of the Department of Justice Canada has a few particular processes that may differentiate it from legislative offices in other jurisdictions. The legislative competencies included in the survey were selected primarily with those processes in mind.

² The survey described in this paper was conducted and designed by me, Julie Ladouceur and other members of the Legislative Services Branch of the Department of Justice Canada, working with the advice and support of the Research and Statistics Division of that Department.

The Legislation Section prepares, on behalf of the Government of Canada, the texts of bills and motions for introduction in Parliament.³ All legislative counsel are required to be members of a law society of a Canadian province or territory.

All legislative counsel in the Section must also be bilingual in English and in French, to an advanced degree. Canada's constitution requires that all federal-level legislation be printed and published in both languages, with both versions being equally authoritative.⁴ To ensure that both language versions contain high-quality text, legislative counsel work in pairs (and sometimes in larger teams) on all drafting files, with anglophone counsel preparing the English text and francophone counsel preparing the French text. Counsel work very closely together in co-drafting the bill and all have equal access to the instructing officers.

The preparation of legislative text is a team effort. Each drafting team is composed of anglophone and francophone legislative counsel and instructing officers. Instructing officers include policy officers from the department sponsoring the bill or motions, as well as Department of Justice counsel who are embedded within the sponsoring department. For example, a proposed amendment to the *Fisheries Act* would have a policy officer from the Department of Fisheries and Oceans and legal counsel from the Fisheries and Oceans Legal Services Unit who is assigned to work with legislative counsel.

Legislative counsel in the Legislation Section typically convene multiple drafting meetings during which they draft text in the presence of instructing officers. Legislative counsel project their electronic documents on screens, allowing instructing officers to comment on the proposed text in real time. Since the recent COVID-19 pandemic, drafting meetings mostly take place online.

Once legislative counsel and instructing officers are satisfied that the draft of a proposed bill or motion accurately implements the Government's instructions, legislative counsel submit both English and French versions of the text to a number of different reviewers:

- legistic revisors, who perform an editorial function
- jurilinguists, who compare the meaning of the English and French texts and propose refinements to the text
- regulations counsel
- bijural specialists, who review legislative text to ensure it is harmonized with the common law of most Canadian provinces as well as with the civil law in the province of Quebec

³ Private members' bills and motions (i.e., those submitted by parliamentarians who are not part of Cabinet) are drafted by legislative counsel who work for the Senate or the House of Commons and not for the Government of Canada. Regulations and other secondary legislation at the federal level are drafted by legislative counsel in the various regulations sections of the Department of Justice.

⁴ See subsection 18(1) *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitutions Act*, 1982, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c. 11.

- review counsel, who are Legislation Section peers

The legislative counsel coordinate these reviews and then, in consultation with the instructing officers, integrate the comments received as warranted. The draft is then reviewed by the sponsoring government department and its minister before being submitted to the Government House Leader for approval and tabling.

List of Competencies in Survey

In preparing the survey, we selected 21 competencies for survey respondents to consider based on our experience working in the Legislation Section and in consultation with the Research and Statistics Division of the Department of Justice as well as the Director and Deputy Director of the Legislation Section. The competencies can be grouped into six categories.

The first group of selected competencies relates to legal skills, reflecting the legal aspect of legislative counsel's roles:

1. General legal knowledge
2. Legal knowledge — construction of statutes
3. Legal knowledge — law of delegated legislation (including enabling authorities)
4. Legal knowledge — specific to area of law in which legislative text is being enacted/amended
5. Legal acumen and judgment (e.g., the ability to understand and judge legal matters quickly, clearly and accurately)
6. Legal imagination and creativity

The second group of competencies relates to linguistic abilities, reflecting the bilingual aspect of Legislation Section counsel's work and their writing skills:

7. Bilingualism
8. Writing skills in primary drafting language

The third group relates to skills in working with others, reflecting the role of legislative counsel in conducting drafting meetings and in working closely with a colleague drafting in the other official language:

9. Ability to work in teams (e.g., co-drafter, instructing officers, review officers, other Justice counsel)
10. Ability to lead/facilitate a drafting session with co-drafter or with drafting officers

11. Ability to elicit relevant information with various participants during the drafting process
12. Ability to negotiate outmodes and manage conflicts

The fourth group relates to policy development and legislative processes, reflecting the advice legislative counsel provide to instructing officers on how to move a legislative file through government and parliamentary processes and their work with government policy:

13. Knowledge of government policy development process (e.g., role of sponsoring department, role of central agencies, role of Cabinet, role of the MC,⁵ setting of government priorities)
14. Ability to interpret, implement and develop instructions and policy
15. Knowledge of parliamentary procedure
16. Policy acumen and judgment (e.g., the ability to understand and judge policy matters quickly, clearly and accurately)

The fifth group relates to drafting skills:

17. Knowledge of legislative structures and of standard provisions used in legislation (e.g., definitions, application, offences, enabling authorities, amendments, coordination, transitionals, enforcement, motions, etc.)
18. Drafting acumen and judgment (e.g., the ability to understand and judge drafting matters quickly, clearly and effectively, including in light of existing timelines)
19. Drafting imagination and creativity

The sixth and last group is a miscellaneous category:

20. Project management (e.g., ability to manage the progress of a legislative file through all necessary steps and procedures)
21. Ability to think strategically and solve problems

Rating and Ranking

Respondents were first asked to **rate** each of the 21 competencies as *not at all important*, *of low importance*, *important* or *very important*; respondents could alternatively state that they had *no opinion* on the competency. Respondents rated each competency without reference to any other competency, and it therefore would have been possible, for example, for a respondent to rate every competency as *very important*.

⁵ "MC" refers to a "memorandum to Cabinet", the document submitted to Cabinet for its decision, including a decision on whether to authorize the Department of Justice to prepare a draft bill.

Respondents were then asked to **rank**, in order, the top five most important competencies. Ranking a competency as the most important resulted in an award of five points to the competency. Ranking it as the second most important resulted in an award of four points to that competency and so on, to the point that ranking a competency as the fifth most important resulted in an award of one point. The total points for each competency were then tallied.

Survey Dates and Number of Respondents

In Phase 1, we sent surveys on March 1, 2022 to all legislative counsel then working in the Legislative Section, including those counsel on assignment to other sections within the Department of Justice.

In Phase 2, we sent surveys on June 13, 2022 to instructing officers listed in our records for each legislative filed opened from November 22, 2021 to that day (November 22 being the first day of the 44th Parliament). The respondents would not be part of an instructing department's upper management.

The Phase 2 survey was similar but not identical to the Phase 1 survey. Both phases contained a list of the same competencies and asked the same questions regarding each competency. The surveys differed in the types of biographical information requested of each respondent. The Phase 1 survey for legislative counsel also contained additional questions regarding training. Surveys were sent out in both English and French, and respondents were able to choose the language of their response.

28 legislative counsel provided responses in Phase 1, and 128 instructing officers provided responses in Phase 2.

Results

The Research and Statistics Division of the Department of Justice Canada compiled the Phase 1 and Phase 2 results.

The following four tables set out the top 10 competencies, according to Phase 1 ratings, Phase 1 rankings, Phase 2 ratings and then Phase 2 rankings. The ratings lists are established by counting the number of *very importants* rated by respondents, and the rankings lists are established by adding up the total number of points determined as set out above.

In selecting the top ten, a tie between competencies in either rating or ranking results in the next ordinal not being assigned. For example, if two competencies are tied for the highest number of *very importants*, they are assigned "1. (tied)" and are listed in alphabetical order. The competency with the next highest number of *very importants* is then assigned third place. In some cases, ties require the presentation of the top 11 competencies.

Table 1: Top Competencies as Rated by Legislative Counsel (Phase 1), based on percentage of very important

	Competency	Percentage of Respondents — Very Important
1. (tied)	Drafting acumen and judgment	86 %
1. (tied)	Legal acumen and judgment	86 %
3. (tied)	Ability to work in teams	82 %
3. (tied)	Writing skills in primary drafting language	82 %
5. (tied)	Bilingualism	79 %
5. (tied)	Legal knowledge — construction of statutes	79 %
7. (tied)	Ability to elicit relevant information from various participants during the drafting process	71 %
7. (tied)	Knowledge of legislative structure and of standard provisions used in legislation	71 %
9.	Ability to think strategically and solve problems	64 %
10. (tied)	Ability to interpret, implement and develop instructions and policy	61 %
10. (tied)	Legal imagination and creativity	61 %

Table 2: Top Competencies as Ranked by Legislative Counsel (Phase 1)

	Competency	Points Awarded
1.	Ability to work in teams	71
2.	Drafting acumen and judgment	63
3.	Writing skills in primary drafting language	54
4.	Bilingualism	37
5.	Ability to interpret, implement and develop instructions and policy	31
6.	Legal knowledge — construction of statutes	21
7.	Drafting imagination and creativity	20
8.	General legal knowledge	19
9.	Project management	18
10.	Ability to think strategically and solve problems	17

Table 3: Top Competencies as Rated by Instructing Officers (Phase 2), based on percentage of very important

	Competency	Percentage of Respondents — Very Important
1.	Legal knowledge — construction of statutes	88 %
2.	Drafting acumen and judgment	84 %
3.	Knowledge of legislative structure and of standard provisions used in legislation	82 %
4.	Writing skills in primary drafting language	81 %
5.	Ability to work in teams	74 %
6.	Legal acumen and judgment	70 %
7.	Legal knowledge — law of delegated legislation (including enabling authorities)	68 %
8. (tied)	Ability to elicit relevant information from various participants during the drafting process	62 %
8. (tied)	Drafting imagination and creativity	62 %
10. (tied)	Ability to interpret, implement and develop instructions and policy	59 %
10. (tied)	Legal imagination and creativity	59 %

Table 4: Top Competencies as Ranked by Instructing Officers (Phase 2)

	Competency	Points Awarded
1.	Drafting acumen and judgment	239
2	Knowledge of legislative structure and of standard provisions used in legislation	202
3.	Legal knowledge — construction of statutes	168
4.	Drafting imagination and creativity	144
5. (tied)	Ability to work in teams	139
5. (tied)	Writing skills in primary drafting language	139
7.	Ability to interpret, implement and develop instructions and policy	134
8.	Ability to elicit relevant information from various participants during the drafting process	93
9.	Legal acumen and judgment	90
10.	Ability to lead/facilitate a drafting session with co-drafter or with drafting officers	84

Discussion

The Present — Survey Results

Asking the respondents to both rate and rank the competencies has provided results that are not entirely consistent internally. For example, Phase 1 respondents rated *legal acumen and judgment* highly, but that competency did not appear on the Phase 1 ranking top 10. They may nevertheless glean some useful insights into the competencies considered to be most important by both legislative counsel and instructing officer by comparing the four top 10 lists.

Four competencies were both rated and ranked highly and thus appear on all four top 10 lists. In alphabetical order, these top four competencies are:

- Ability to work in teams
- Drafting acumen and judgment
- Legal knowledge — construction of statutes
- Writing skills in primary drafting language

The results are best described as confirmatory of what many legislative counsel might have expected, rather than revelatory. Three of the most important competencies identified in the results — *drafting knowledge and acumen*, *legal knowledge — construction of statutes* and *writing skills in primary drafting language* — relate to our “traditional” duties: being able to judge drafting matters, writing, and knowing how to interpret statutes. The fourth competency listed among the most important, *ability to work in teams*, is an important competency for counsel in the Legislation Section of the Department of Justice Canada, given the particular emphasis on drafting in tandem between legislative counsel and the extensive drafting meetings that take place between legislative counsel and instructing officers.

A fifth competency, *knowledge of legislative structures and of standard provisions used in legislation*, appears in three of the tables and is rated and ranked highly by instructing officers in particular. Instructing officers rely on legislative counsel for advice on structuring policy ideas and on what provisions may be needed to implement them.

Four other additional competencies each appeared on at least three of the top 10 lists but were not as highly rated or ranked as the competencies listed above. Again, in alphabetical order, these second-tier competencies are:

- Ability to elicit relevant information from various participants during the drafting process
- Ability to interpret, implement and develop instructions and policy
- Drafting imagination and creativity
- Legal acumen and judgment

The four second-tier competencies are important skills that assist legislative counsel in exercising the top-tier competencies, allowing them to write and interpret legislative text and exercise judgment in doing so.

One more competency is worth mentioning here. *Bilingualism* was rated and ranked highly, though only by legislative counsel. As set out above, teams of legislative counsel prepare federal Canadian legislation simultaneously in English and in French. Legislative counsel must therefore be able to read and interpret legislation in both languages. The constant back and forth between language versions required of legislative counsel is not required of instructing officers to the same extent, which perhaps explains why this competency does not appear on the Phase 2 tables.

One mild surprise is that competencies that relate to policy facilitation were not ranked or rated as high as the “traditional” competencies. My personal experience is that legislative counsel regularly assist in shaping the policy. This role is increasing over time, as the timeframes within which policy must be developed continue to be compressed. As we were preparing the survey, we hypothesized that this role would be reflected in the responses to the survey. This hypothesis was borne out by the survey results to some extent, in that 89% of legislative counsel and 91% of instructing officers rated *policy acumen and judgment* as either *important* or *very important*. But neither Phase 1 nor Phase 2 respondents considered this competency as being as important as other competencies.

Speculating on the Future — the Impact of Artificial Intelligence

No discussion of the future of any profession or discipline can take place without considering the future impact of artificial intelligence systems (AI). The profession of legislative drafting is no exception.

AI seems poised to take over certain tasks that legislative counsel currently perform. Notably, when provided with the proper prompts, AI is (or will be capable of) producing high-quality text, and is capable of reviewing vast quantities of data to provide answers or examples in response to queries.⁶ These capabilities have already been put to use: a bill largely prepared by AI has already been introduced in the US state of Massachusetts,⁷ and

⁶ See, e.g., C. Stokel-Walker, “Generative AI is Coming for the Lawyers”, wired.com, 21 Feb. 2023, <<https://www.wired.com/story/chatgpt-generative-ai-is-coming-for-the-lawyers/>>; M. Witten, “Applying Generative AI to Law: Opportunities and Risks”, 23 October 2023, <<https://law.queensu.ca/news/Applying-generative-AI-to-law>>; Government of Canada, “Guide on the Use of Generative AI”, <<https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/guide-use-generative-ai.html>>; S. Subramanian, “AI and the End of the Human Writer”, newrepublic.com, 22 April 2024, <<https://newrepublic.com/article/180395/ai-artificial-intelligence-writing-human-creativity>>

⁷ M. Chatterjee, “AI just wrote a bill to regulate itself”, politic.com, 19 July 2023, <<https://www.politico.com/newsletters/digital-future-daily/2023/07/19/why-chatgpt-wrote-a-bill-for-itself-00107174>>.

opposition members at the federal level in Canada were accused of using AI to prepare thousands of motions as part of an effort to filibuster a government bill.⁸

AI may therefore pose somewhat of an existential threat to legislative counsel. The ability to produce high-quality text and to scour the statute book to find precedents track two of the top legislative counsel competencies identified by the survey: *writing skills in primary drafting language* and *knowledge of legislative structure and of standard provisions used in legislation*. Many legislative counsel may consider these competencies as defining our role: our training has focused on learning how to construct a legislative sentence, often by adapting precedents and by using formulaic language.

Let us assume that AI's usefulness in suggesting legislative text will only continue to improve. If AI will be able to perform two of the core competencies currently performed by legislative counsel, will legislatures and governments continue to require a cadre of counsel that specialize in the preparation of legislation? Or will legislatures' and governments' needs be met by entrusting the preparation of legislation to a subject-matter expert using AI to prepare the legislative text? For example, could amendments to a jurisdiction's copyright statute be prepared by a specialist lawyer working in that field, using AI to find relevant precedents and prepare the legislative text?

There is no doubt that AI will disrupt many industries. Experts predict that AI will indeed have an impact on certain sectors. The Cyberjustice Laboratory of the University of Montreal has stated that

AI will be a powerful tool for many workers, helping them improve their skills and expertise, while boosting to the overall economy. However, it will make many high-paying jobs that require creative skills and logical reasoning obsolete. Some of these at-risk jobs include writers, web and digital designers, financial quantitative analysts, and software engineers. The concern is not so much that AI will lead to large-scale unemployment, but that companies will replace well-paying white-collar jobs with AI-enabled automation.⁹

Not very much extrapolation is required to see legislative counsel in the description of jobs that may become obsolete.

On the other hand, the results of the survey provide some basis on which to conclude that legislative counsel, as a specialized field of lawyering, may still be required in the future. Survey respondents indicated that legislative counsel offer more than just writing skills or knowledge of the statute book. As set out previously, they identified a number of

⁸ Note that the allegations were denied: M. Rabson, "Liberals Accuse Conservatives of Using AI for Amendments to Jobs Bill as Votes Loom", The Canadian Press, 11 April 2024, <https://www.thecanadianpressnews.ca/environment/liberals-accuse-conservatives-of-using-ai-for-amendments-to-jobs-bill-as-votes-loom/article_27be1761-c4fa-5370-b5bf-6a11f4c93d99.html>.

⁹ L. W. Jeagal, "The Future Possibilities of AI", online course prepared for the Department of Justice Canada by the Cyberjustice Laboratory of the University of Montreal (emphasis added).

competencies beyond writing the text and knowing the types of provisions that are used in legislation, notably the following:

- Ability to elicit relevant information from various participants during the drafting process
- Ability to interpret, implement and develop instructions and policy
- Ability to work in teams
- Drafting acumen and judgment
- Drafting imagination and creativity
- Legal acumen and judgment
- Legal knowledge — construction of statutes

Even if AI could assist any lawyer with preparing legible text and offering up relevant precedents, our abilities in interpreting statutes, and in interpreting, implementing and developing instructions and policy, and our legal knowledge regarding the interpretation of statutes, suggest that legislative counsel will continue to have a role in the development of legislative texts. Our ability to interpret, implement and develop instructions and policy will be necessary to assess whether the policy is ready for implementation. Our drafting acumen and judgment will allow us to formulate the prompts necessary to obtain the best results and then evaluate the text proposed by AI.¹⁰ Our imagination and creativity will allow us to develop new ways to structure legislative texts to keep in step with society's needs. We bring a unique perspective and have developed particular skills that enable us to spot and resolve issues that are less obvious to counsel not working in our field.

That legislative counsel will continue to have a role in the future is supported by anecdotal evidence from my own experience. Some instructing officers I have encountered have initially assumed that my role as legislative counsel was to input their words or, at most, to brush up on the language they suggested. My co-legislative counsel and I demonstrated to such instructing officers that we offer so much more. Yes, we focus on the wording of the text, but we also help conceptualize and articulate the legal ideas needed to implement the policy. We give advice on legislative approaches and elicit crucial policy details that otherwise would remain implicit and unrecognized. Experienced policy officers, including those who are lawyers, have repeatedly thanked legislative counsel in the Department of Justice not just for our role in preparing text, but for asking the questions we ask and for giving suggestions on how to structure their ideas.

The challenge going forward, then, may be less about finding an *actual* role for legislative counsel and more about whether, in light of the perceived capabilities of AI, we succeed in making the case for retaining a specialized cadre of legislative specialists. Stated in other

¹⁰ This point was most clearly articulated by my colleague Arina Joanisse, legislative counsel in the Legislation Section of the Department of Justice Canada, during her review of an earlier version of this paper.

words, the issue in the future may be more convincing officials who do not work with us, and who thus may not be fully aware of the range of our competencies, that the specific legislative counsel role continues to be relevant. Officials who are responsible for allocating budgets and who conceive of legislative counsel as “drafters”, in the narrowest sense of that term, may assume that AI systems will eventually adequately replace legislative counsel and, in an effort to save costs, do away with legislative counsel offices.

Legislative drafting offices may therefore be required in the future to justify their continued existence. To do so, they will need to articulate the full range of services they provide to their instructing officers. Legislative drafting offices should also consider how to integrate AI into their current practices and start evaluating which competencies they will need to develop to work with AI, and then how to train for them.

Conclusion

The results of the survey of legislative counsel competencies confirmed that legislative counsel are valued for our drafting and legal acumen, for our writing ability, for our knowledge of legislative provisions and of the construction of statutes.

There may come a time, however, when legislative drafting offices may be required to justify their continued existence if two important features of our current role, our writing ability and our knowledge of legislative provisions, are taken over by AI. Perhaps a time will come when, strictly speaking, we are no longer “drafters”. Legislative drafting offices should perhaps consider what contributions legislative counsel, as a distinct field, make to the development of legislation beyond those that may be performed by AI. The results of the survey hopefully provide a basis on which to reflect on what those contributions are and how they may be articulated to a broader audience.

The Drafter, the Instructor, their Bill and the Minister

*Natalie Plumstead*¹



Abstract

This paper considers the future role of the drafter and the instructor in the development of legislative proposals for complex and novel policy problems. When should a drafter become involved in a legislative proposal?

The complexity and challenges of contemporary government is changing the traditional roles of the drafter and the instructor.

The need for new models for the delivery of legislation that responds to complex and novel policy problems is compressing the distance between the purely technical skill of the drafter and the policy work of the instructor.

Introduction

Drafters have always been at the forward line of the development of complex and novel schemes into statute law. This has become ever more apparent with the growing demand that policy and law be more representative of individuals citizens and their needs and rights.² The drafter's analytical skills and drafting knowledge are critically important to the conceptual plan of a new law that may be without precedence and is intended to solve a complex and novel policy problem.

The drafter and instructor in the development of a new law of this kind may, as a matter of necessity, engage in a different arrangement in the drafting process, to draw on their respective skills in an open environment. This different arrangement compresses the

¹ Natalie Plumstead is a legislative drafting consultant, instructor and PhD Candidate at RMIT University. She is supported by an Australian Government Research Training Program Scholarship. Natalie is also a solicitor advocate in the mental health jurisdiction. The author thanks Andy Beattie, Chief Parliamentary Counsel of Scotland, for the insightful discussion. The views expressed in this article are the author's alone.

² M. Kirby, "The never-ending challenge of drafting and interpreting statutes: a meditation on the career of John Finemore QC" (2012) 36 *Melbourne University Law Review* 140 at p 151.

distance between the purely technical skills of the drafter and the policy work of the instructor.

To reflect on the changing relationship between the drafter and the instructor in the development of new laws for complex and novel policy problems, this paper will consider in detail three aspects of the drafting process:

- Drafting as a creative pursuit,
- Consensus drafting processes: a case study of possible approaches for mental health law, and
- Future implications for drafters and drafting offices.

Drafting as a creative pursuit

On one level, the drafting process seems very straight-forward. Sir Geoffrey Bowman KCB, the then First Parliamentary Counsel of the Office of the Parliamentary Counsel (UK), suggested it could be summarised by two rules:

- Rule One – decide what you want to say.
- Rule Two – say it.³

There is perhaps an intermediary rule that is needed in the context of human-centred legislation that is required to solve complex and novel policy problems.

- Rule One A – what is it?

The intermediary rule offers a creative potential in the development of human-centred legislation such as mental health law, that engages with the individual human rights of vulnerable individuals.

The intermediary rule ‘*what is it*’ in the context of mental health law requires the drafter and the instructor to engage in a different arrangement to the traditional sequential drafting process of:

Policy>Draft Drafting Instructions>Settling>Drafting of the Bill.

The intermediary rule requires an iterative process where the drafter and instructor, in partnership with lived-experience advisers, analyse what the law is to say and, drawing on lived-experience expertise, synthesize complex and novel policy into legislative form.

This is a multi-disciplinary Bill team approach to the drafting process, where ideas are developed through a series of iterative phases of:

Testing>Refinement>Reworking Policy>Drafts

³ G. Bowman, “Sir William Dale Annual Memorial Lecture: Is legislation literature?” (2015) 3 *European Journal of Law Reform* 385 at p 386.

The creative potential of the intermediary rule is important to explore, as it uses an open environment to identify the legislative model that is as close as possible to communicating the policy objectives.⁴ In the case of mental health law that engages the individual human rights of vulnerable individuals, there is potential to use that open environment to draw on lived-experience expertise to identify new legislative models that are as close to the mark as possible.

Drafting process as an art rather than a science

There will always be more than one way to approach a drafting problem to produce a legally effective Bill. Drafters and instructors engage in a process of testing and refinement to narrow the issues and find the legislative form that achieves the policy intention. This is where the drafting process is as an art rather than a science.⁵

It is important to understand the potential and creativity that exists in the art of composing a draft in response to a policy idea. This is especially true where a drafter is set the task of developing a new law where there is no precedent, or it is intended to repeal entirely the current law and make a new law.

Where the drafter is set this kind of task, the intermediary rule '*what is it*' takes on a heightened importance in the drafting process. The drafter's role is to carry out a ruthless questioning and analysis process to understand the policy intention and find a legislative model that achieves it.⁶

In mental health law, the ruthless analysis of the policy intention to discover the legislative model that responds to the intermediary rule '*what is it*' may be carried out as a series of iterative phases. The iterative phases offer an open environment between the drafter, the instructor and lived-experience advisers to test and refine ideas throughout the drafting process to see if the approach is sound.

Lived-experience advisers who are an active partner of the drafter and instructor in the initial analysis of the policy intention provide the knowledge, principles and perspective required to identify legislative models that are suitable to promote the human rights of individuals.

Consensus drafting processes: a case study of possible approaches for mental health law

Rights-based principles are a common legislative model found in contemporary mental health legislation. The purpose of the model is to ensure vulnerable individuals with a mental illness have access to treatment as required for their mental illness and consistent with their right to self-determination are free of non-consensual medical treatment, and

⁴ S. Laws, "Giving effect to policy in legislation: How to avoid missing the point" (2011) 32:1 *Statute Law Review* 1 at 16.

⁵ Bowman at 386.

⁶ Bowman at 399.

enabled to participate in decision-making.⁷ The principles are intended, together with the operative provisions of mental health legislation, to “alter the balance of power” between medical authority and vulnerable individuals.⁸

The introduction of rights-based principles as a balancing mechanism has now been a feature of many mental health laws for almost 30 years. Principles were introduced to address the operation of mental health legislation as then in force in the 1980s that provided (amongst other powers) for substituted decision-making and coercive powers, including compulsory treatment.

The *Mental Health Act 1983* (UK) is an example of this kind of mental health law that was amended to introduce the balancing mechanism of rights-based principles. The *Mental Health Act 1983* (UK) as first enacted was an influential model for mental health laws in many Australian jurisdictions. The impact of these Australian mental health laws was considered in the *Report of the National Inquiry into the Human Rights of People with Mental Illness* (the “Burdekin Report”) in 1993.⁹

The rights-based principles legislative model introduced following the Burdekin Report has been enacted and re-enacted in a variety of forms in Australia. The purpose of the rights-based principles, in the context of substituted decision-making and coercive powers such as compulsory treatment, is to promote and emphasize the dignity and human rights of individuals.¹⁰ The model does not appear to be effective: about half of the people admitted to public acute mental health inpatient units did so under compulsory treatment in 2018-19 in Victoria, Australia.¹¹

In 2023 the World Health Organization found that legislative models that included substantive provisions that provided for substituted decision-making and coercive powers alongside rights-based principles are ineffective in satisfying the human rights standards¹² set by the United Nations *Convention on the Rights of Persons with Disabilities*.¹³

The drafting processes followed in the development of mental health legislation with rights-based principles have generally not been led by lived-experience advisers, who are active and empowered partners in the ruthless analysis of *what is* the legislative model that communicates the complex and novel policy demands of a new mental health law.

⁷ *PBU & NJE v Mental Health Tribunal*, [2018] VSC 564 at para 67 [*PBU*].

⁸ *PBU* at para 67.

⁹ Human Rights and Equal Opportunity Commission, *National Inquiry into the Human Rights of People with Mental Illness* (Final Report, 1993) vol. 1.

¹⁰ *PBU* at para 65.

¹¹ Royal Commission into Victoria’s Mental Health System, Parliamentary Paper No. 87 (2018-2019) (Interim Report, 2019) 229.

¹² World Health Organization, United Nations Human Rights Office of the High Commissioner, *Mental Health, Human Rights and Legislation: Guidance and Practice* (2023) at p xvi.

¹³ United Nations, *Convention on the Rights of Persons with Disabilities and Optional Protocol* (13 December 2006).

It is common for lived-experience expertise to be drawn on as a part of the inquiry process that leads to the identification of the need for law reform, but rarely as an empowered partner in a drafting process.

This law reform dynamic is apparent in Australia. Following the Burdekin Report, a further 32 separate inquiries were completed between 2006 and 2012 on the continued need to reform the mental health system.¹⁴ Individuals provided extensive evidence to these inquiries on the human rights abuses they had experienced in receiving treatment.

Many of the mental health laws enacted following these inquiries introduced rights-based principles along with substantive provisions that provided for substituted decision-making and coercive powers designed to prevent serious harm to individuals and the public.¹⁵

A case in point is the now repealed *Mental Health Act 2014* (Vic) that enacted a rights-based principles legislative model. The Act gave legislative form to the purpose that mental health decision making should be guided by rights-based principles that promoted human rights, including that mental health treatment should be provided to individuals in the least restrictive way.¹⁶

Consensus drafting process

In Victoria Australia, less than 5 years after the enactment of a rights-based principles legislative model with the *Mental Health Act 2014* (Vic), the Royal Commission into Victoria's Mental Health System commenced in February of 2019. The Royal Commission found that the rights-based principles in the *Mental Health Act 2014* (Vic) had failed to strike an appropriate balance between the human rights of individuals and the use of coercive powers. For example, mental health practitioners were not complying with requirements of the legislation, to seek informed consent of individuals before administering treatment, and the rights-based principles were not embedded into clinical practice.¹⁷

Recent experiences of the failure of the traditional sequential drafting process to develop and enact a legislative model that satisfies the complex and novel policy requirements of a new mental health law point to the need for a new approach.

Multi-disciplinary bill teams led by lived-experience advisers, who develop ideas through a series of iterative phases, may be one way to include the sophisticated body of knowledge and expertise held by individuals. The vulnerability of individuals means that any drafting

¹⁴ S. Rosenberg & I. Hickie, 'If we're to have another inquiry into mental health, it should look at why the others have been ignored', *The Conversation* (30 October 2018) <<https://theconversation.com/if-were-to-have-another-inquiry-into-mental-health-it-should-look-at-why-the-others-have-been-ignored-105728>>

¹⁵ B. Bennett & I. Freckelton, *Australian Public Health Law: Contemporary Issues and Challenges* (The Federation Press, 2023) 218.

¹⁶ Royal Commission into Victoria's Mental Health System, *Final Report Volume 4: The Fundamentals for Enduring Reform* (February 2021) vol 4, 17 [Royal Commission]

¹⁷ Royal Commission at 28.

process must be empowering. One way that this can be achieved is by a consensus drafting approach.

A consensus drafting process that is highly participatory and that takes place in an open environment may give priority to shared decision-making between the drafter, the instructor and lived-experience advisers.

Future implications for drafters and drafting offices

There is a growing recognition that the development of human-centred legislation that engages with individual human rights, like mental health law, must be led by the lived experience of individuals.

In the case of mental health legislation, the importance of the lived experience of individuals is set out in the ‘*World Mental Health Report: Transforming Mental Health for All (the Report)*’.¹⁸ The Report recommends that individuals with lived experience are provided with full empowerment and involvement in policy, planning and legislation.¹⁹

Empowerment means lived-experience advisers participating in a legislation project from pre-project phase, throughout drafting and until the end of the process.²⁰ The insights and lived-experience expertise that individuals could bring to the development of substantive provisions that engage human rights is clear.

One way to ensure lived-experience expertise is central to the development of mental health legislation is a multi-disciplinary bill team using a consensus drafting approach. A multi-disciplinary bill team that includes a lived-experience adviser, instructor and drafter is able to take a consensus decision-making approach to empower the contribution of individuals with lived experience.

The creative potential of the analysis conducted by the drafter and instructor to discover the legislative model for a new approach to mental health legislation is extended and given a new dimension by embedding the lived-experience expertise of individuals.

The drafter’s role in a multi-disciplinary bill team is critical. The drafter’s skill in finding clarity of thought and offering a rigorous depth of analysis supports the iterative process that a multi-disciplinary bill team may follow to develop mental health legislation that solves a complex and novel policy problem.

The traditional sequential drafting process that a drafter and instructor may undertake to identify the appropriate legislative model is incomplete without the lived-experience expertise of individuals.

¹⁸ World Health Organization, *World Mental Health Report: Transforming Mental Health for All* (16 June 2022) 92 and 170.

¹⁹ C. Sartor, ‘Mental health and lived experience: The value of lived experience expertise in global mental health’ (2023) 10, *Cambridge Prisms: Global Mental Health*, 2.

²⁰ Sartor at 3.

Legislative models that incorporate rights-based principles are a useful illustration of the limitations of a traditional arrangement of drafter and instructor in the development of a legislative model to solve a complex and novel policy problem. There is scope to consider the future composition of Bill teams to deliver human-centred legislation that promotes and represents the individual human rights of people.

Drafters have a unique skill set and creative problem-solving mindset that is required by the instructor and their Minister to deliver human-centred legislation to solve some of the most complex and novel policy problems facing government.

Unravelling the Nexus Between Policy and Legislation: Do Poor Policy Development, Inadequate Drafting Instructions and Insufficient Resources Hamper the Legislative Process in Jamaica?

Timothy Roper¹



Abstract

It is a well-known fact that the legislative process is essential in facilitating the effective governance of a state. Before legislation is drafted and subsequently enacted, policy must first be conceptualized by the respective policymakers, whose main role is to adopt the objectives of the reigning government. However, a recurrent issue seems to be the lack of effective and efficient policymaking within the various Commonwealth Caribbean countries, and Jamaica is no exception. In fact, without the proper research and consultation, it becomes increasingly evident that the average legislative drafter has little to no guidance from the policymaker in composing an ironclad bill for review. Legislative drafters are severely understaffed and lack the requisite resources needed to draft efficient laws as well. Many academics and political analysts have also asserted that shoddy legislation in need of reassessment is often passed due to the insufficient expenditure of time toward proper policy development. Furthermore, policymakers have been known to rush the drafting of legislation which resultantly leaves little to no time for pre-enactment scrutiny. This study therefore aims to provide insight into the challenges stemming from the complexities of the legislative process in Jamaica. Aspects such as Effective Policy Conceptualization, Adequate Policy Research & Consultation, Instructing the Legislative Drafter, and Sufficient Drafting Capacity will resultantly be analyzed. By proposing recommendations

¹ Attorney-in-Training and Student at the Norman Manley Law School.

for enhancing policy development and legislative drafting practices, this paper also seeks to contribute to the improvement of legislative outcomes in the country.

Introduction

It is a well-known fact that the legislative drafting process is essential in facilitating the effective governance of a state. In fact, legislation plays a significant role in managing social norms and behaviours of individuals within a society. Legislators, in turn, bear the responsibility of assessing laws against the requisite standards for good governance.² However, before legislation is successfully enacted, policy must first be conceptualized. Policy can further be defined as a course of action which the Government adopts to address pertinent issues being faced by the populace.³

It can therefore be surmised that formulation and implementation of effective public policy lie at the heart of a nation's development. For instance, some scholars posit that the first step in developing legislation is identifying key social or political issues that require Government intervention.⁴ However, a recurrent issue seems to be the lack of conceptualizing effective policy,⁵ of which Jamaica is no exception. It can now be observed that policies are often conceptualized and prioritized based on the political ideologies exhibited by the reigning Government. Jamaica suffers from this issue, considering the country's policies are rarely formulated via bi-partisan negotiations, but rather through intended outcomes that the Government at the time wishes to achieve.⁶ What is perhaps even more concerning is the blatant disregard policymakers have for assessing the means and mechanisms by which the policy might be implemented through legislation.⁷

It has also been observed that policymakers do not afford sufficient time in conducting adequate research, nor do they engage in consultations with the legislative drafter, even though such occurrences are stipulated under the Jamaican legislative process.⁸ Poor consultation may also potentially blindside the legislative drafter upon receiving the draft

² A. Seidman, R.B. Seidman & N. Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, 2001) at p 5.

³ The Planning Institute of Jamaica, "Policies & Plans - The Planning Institute of Jamaica" (*The Planning Institute of Jamaica*) <www.pioj.gov.jm/policies-plans/> accessed 30 November 2023.

⁴ V.E. Aitken, "An Exposition of Legislative Quality and Its Relevance for Effective Development" (Loyola University, 2013) 10 <<https://www.luc.edu/media/lucedu/prolaw/documents/AITKEN%20FINAL%20ARTICLE.pdf>> accessed 26 November 2023.

⁵ M. Zamboni, 'Legislative Policy and Effectiveness: A (Small) Contribution From Legal Theory' (2018) 9(3) *European Journal of Risk Regulation* at p 418 <<http://dx.doi.org/10.1017/err.2018.32>> accessed 26 November 2023.

⁶ E.W. Boswell-Munro, 'Public Policy and Parliamentary Counsel: A Jamaican Perspective' (Master's Thesis, University of the West Indies: Cave Hill Campus 1994) 49.

⁷ R. Considine, 'Legislative Counsel Facilitating Consultation Within Government' (2017) 1 *The Loophole — Journal of the Commonwealth Association of Legislative Counsel* at p 7.

⁸ Ministry of Justice, "Preparation and Presentation of Legislation" (*Home - Office of the Cabinet*, April 2011) <https://Cabinet.gov.jm/wp-content/uploads/2017/04/Presentation_of_Bills_revised_April_2011_.pdf> accessed 28 November 2023 ["Preparation and Presentation of Legislation"].

instructions. Many profess that policymakers can benefit in understanding how implementers and drafters think while formulating policy.⁹ Yet, this rarely occurs. It is also apparent that Jamaica, much like many other developing Commonwealth states, does not have sufficient resources available to conduct substantial research¹⁰ before initiating policy development.

Without research and consultation, it also becomes increasingly evident that the average drafter has little to no guidance from the policymaker in composing an ironclad bill for review.¹¹ The Jamaican legislative process stipulates that the policymaker must provide the drafter with sufficient instructions before preparing the draft bill for Cabinet submission and approval. However, this is not often the case. Instead, it is likely that the scope of the legislative drafter's responsibilities is not fully understood, nor appreciated by the policymaker, resultantly causing a gap between both stakeholders. This is a shame, considering the legislative drafter's role is very complex, since the drafter must combine practical and theoretical concepts.¹² It has often been common thought that the legislative drafter's role is hyper-focused on the draft bill's form, and not its substance.¹³ Many also posit that drafters should strictly confine themselves to simply converting policy proposals into legislation using legal jargon, considering drafters are short in supply.¹⁴ However, while this may be the ideal, the lack of sufficient instructions has in many instances caused the legislative drafter to take on a more substantive role in designing policy and legislation.

The legislative landscape in Jamaica and the Commonwealth Caribbean also faces a formidable challenge due to a severe shortage of experienced legislative drafters and parliamentary counsel.¹⁵ A lack of support staff further burdens legislative drafters, considering incoming staff require personal supervision throughout the entire legislative drafting process. Policymakers also tend to rush drafters in compiling draft Bills,¹⁶ often resulting in ineffective laws.

In summation, the delicate dance between policy development and legislative drafting is a crucial determinant of a nation's legislative efficacy. This paper will therefore assess the impact of poor public policy conceptualization, inadequate research and consultation, and insufficient drafting resources on the legislative process in Jamaica. Through an examination

⁹ M. Abdullahi & N. Othman, "Bridging the Gap Between Policy Intent and Implementation" (2020) 6:1 *Journal of Science, Technology and Innovation Policy* at 12.

¹⁰ R. Hewagama, 'The Challenges of Legislative Drafting in Small Commonwealth Jurisdictions' (2010) 36:1 *Commonwealth Law Bulletin* at 120 <<http://dx.doi.org/10.1080/03050710903573514>> accessed 26 November 2023.

¹¹ Seidman et al. at p 23.

¹² Zamboni at p 418.

¹³ A. Seidman & R.B. Seidman, "Instrumentalism 2.0: Legislative Drafting for Democratic Social Change" (2011) 5:1 *Legisprudence* 95, 126 <<http://dx.doi.org/10.5235/175214611796404831>> accessed 26 November 2023.

¹⁴ B.H. Simamba, *The Legislative Process: A Handbook for Public Officials* (Authorhouse, 2009) at p 9.

¹⁵ Simamba at p 3.

¹⁶ Seidman & Seidman at p 127.

of the four key chapters — *Effective Policy Conceptualization, Adequate Policy Research & Consultation, Instructing the Legislative Drafter, and Sufficient Drafting Capacity* — a comprehensive understanding of the challenges faced by Jamaica in realizing effective and robust legislative outcomes will be achieved. Chapter 5 of this paper will also propose recommendations that can potentially reshape policy development and legislative drafting practices in the country, based on new solutions, and existent frameworks already in place.

Stages in the Legislative Preparation and Presenting of a Public Bill

Before assessing the insufficiencies of the policy development and legislative drafting process, an overview of the stages in processing a public bill in Jamaica must first be assessed.

Formulation of Policy for the Annual Legislative Programme

This is usually conducted at the beginning of each year.¹⁷ Here, the respective policymakers within each ministry are tasked with the responsibility of identifying a problem to be solved by a policy objective.¹⁸ The policymaker then submits proposals for policies to the Legislation Committee, which is a subcommittee of the Cabinet.¹⁹ The proposal must also include criteria, inclusive of the proposed length of the proposed bill, and the feasibility of the policy being passed within a year.²⁰ Research and consultation must also be conducted by the policymaker, and a draft of their findings should be provided to the Legislation Committee. After, the Committee confers with other stakeholder entities in the legislative process²¹ including ministries, the Attorney General's Chambers (AGC) and the Office of the Parliamentary Counsel (OPC).²² The Legislation Committee subsequently prioritizes these proposals before they are announced in Parliament.²³

Cabinet Approval of the Policy — First Submission

A memorandum highlighting the policy proposal²⁴ is then submitted to the Cabinet by the relevant ministry. Cabinet members will then confer amongst themselves to determine whether the policy ought to be implemented into law.²⁵

¹⁷ K. Hardee, S. Suburan and The Futures Group International, *Steps to Passing Laws and Policies in Jamaica: Implications for Adolescent Reproductive Health* (The Futures Group International Report, 2001) at p 2.

¹⁸ Aitken at p 12.

¹⁹ Hewagama at p 121.

²⁰ S. Mothibatsela, J. Wilson and Improved Access to Justice in The Caribbean (IMPACT Justice Project), *The Legislative Process And Drafting Instructions: A Manual For Instructing Officers In Caricom Member States* (Justice Report, Caribbean Law Institute Centre, UWI Cave Hill 2016) at p 26.

²¹ "Preparation and Presentation of Legislation".

²² "Preparation and Presentation of Legislation".

²³ "Preparation and Presentation of Legislation".

²⁴ Mothibatsela et al. at p 25.

²⁵ "Preparation and Presentation of Legislation".

Providing Instructions to the Legislative Drafter

Once Cabinet gives approval that legislation is the best course of action to implement the policy, the client ministry is directed to provide instructions to the legislative drafter,²⁶ who in Jamaica's case, is a member of the OPC.²⁷ The instructions must be clear, unambiguous, and in furtherance of fulfilling the main goal and objective of the policy.²⁸

Preparation and Circulation of the Bill

At this stage, the drafter begins the process of drafting a bill — *a proposal for an act of Parliament*²⁹ — in accordance with the instructions handed down by the client ministry³⁰ and the decision of the Cabinet.³¹ The bill is then circulated to relevant stakeholders, including the AGC.³²

Consideration by the Legislation Committee

Once the AGC gives approval, the bill is submitted to the Legislation Committee again. It will assess the bill and determine whether it should be submitted to the Cabinet for final confirmation.³³

Cabinet Approval of the Draft Bill — Second Submission

After the bill is approved by the Legislation Committee, the policymaker must submit a memorandum to Cabinet.³⁴ Cabinet will subsequently give approval for the bill to be introduced in Parliament upon assessing key factors including the bill's purpose, budgetary concerns, and other implications that the bill may have on the wider society.³⁵

Introduction to Parliament

At this stage, the bill is printed and submitted to the table of the Senate and the House of Representatives. Here, the bill goes through various reading stages.³⁶ After the second

²⁶ "Preparation and Presentation of Legislation".

²⁷ Ministry of Justice, "Office of the Parliamentary Counsel | Ministry of Justice" (Homepage | Ministry of Justice) <<https://moj.gov.jm/office-parliamentary-counsel/>> accessed 28 November 2023.

²⁸ Hardee et al. at p 4.

²⁹ Jamaica Information Service, "The Legislature" (Jamaica Information Service – The Voice of Jamaica) <<https://jis.gov.jm/Government/the-legislature/>> accessed 28 November 2023 ["Legislature"].

³⁰ Mothibatsela et al. at pp 40-41.

³¹ "Preparation and Presentation of Legislation".

³² "Preparation and Presentation of Legislation".

³³ Hardee et al. at p 4.

³⁴ Hard et al. at p 4.

³⁵ Mothibatsela et al. at p 27.

³⁶ Jamaica Information Service, "Parliamentary Proceedings & Making Laws – Jamaica Information Service" (Jamaica Information Service – The Voice of Jamaica) <<https://jis.gov.jm/information/get-the-facts/parliamentary-proceedings-making-laws/>> accessed 28 November 2023.

reading, the bill has the potential to be discussed by the entire house, or an individual subcommittee (joint select committee).³⁷ Resultantly, full attention is given to the bill before it is passed into being. The bill will not become law until both houses agree after the third reading of the bill.

Royal Assent, Publication and Implementation

Once the bill has been approved by both houses in the legislature, the Head of State will give it royal assent.³⁸ This transforms the bill into a law to be published and implemented.

Chapter 1: Effective Policy Conceptualization

Public policies are often conceptualized when the Government identifies a key problem that can only be addressed by legislative intervention.³⁹ However, while such problems may be easily identified by the reigning Government, Zamboni posits that the policymaker must first consider whether the proposed policy is truly effective.⁴⁰ Effectiveness can be further determined where policy possesses a distinct objective. Aitken offers more clarification, having stated that legislation serves the purpose of giving Government policy legal effect⁴¹ as a social and political institute governed by rules and norms.⁴²

It can therefore be inferred that the policy development process is perhaps the most integral cog in the wheel of legislative drafting. Where ineffective policy is established, even more difficulties may arise in drafting effective legislation. Keyes and Dewhurst shed light on the reality that policy is often conceived based upon the objectives of the democratically elected governments of the day.⁴³ These governments place priorities on their mandates, which the populace in turn considers when selecting representatives.⁴⁴

Considering these factors, it is clear that state actors and political agents, much like the average citizen, now place focus on the intended outcome of the policy.⁴⁵ Seidman and colleagues have similarly found that political leaders often conceptualize broad policy objectives, but seldom provide strategies for achieving them.⁴⁶ It is perhaps likely that such

³⁷ Mothibatsela et al. at p 64.

³⁸ "Legislature".

³⁹ Aitken at 10.

⁴⁰ Zamboni at p. 418.

⁴¹ Aitken.

⁴² H.L.A. Hart, *The Concept of the Law*, 2nd ed (Clarendon Press, 1994) at p 320.

⁴³ J.M. Keyes & D. Dewhurst, "Shifting Boundaries Between Policy and Technical Matters in Legislative Drafting" (2016) 1 *The Loophole — Journal of the Commonwealth Association of Legislative Counsel* at p 24.

⁴⁴ H. Xanthaki, "An Enlightened Approach to Legislative Scrutiny: Focusing on Effectiveness" (2018) 9:3 *European Journal of Risk Regulation* 431, 2 <<http://dx.doi.org/10.1017/err.2018.25>> accessed 26 November 2023.

⁴⁵ K.T. Hudson-Phillips, "A Case for Greater Public Participation in the Legislative Process" (1987) 8:2 *Statute Law Review* at p 77 <<http://dx.doi.org/10.1093/slr/8.2.76>> accessed 17 November 2023.

⁴⁶ Seidman et al. at p 23.

action is often taken solely for the purpose of appeasing potential voters.⁴⁷ Conversely, Zamboni argues the true markers of effective policy are the steps, processes, and means by which legislation achieves these goals. She states: “[e]ffectiveness is instead the path that legislation has to follow to fulfil the values that the community or the political representatives consider to be the foundations upon which society is (or should be) built.”⁴⁸

Mousmouti offers further clarity in stating that the measure of successful outcomes and objectives determine whether laws are efficacious and not effective in nature. She posits that efficacy places a concerted focus on the overall functions and intended contributions the policy may have on wider society.⁴⁹ However, while a policy’s intended outcome is essential in developing efficacious law, the mechanics, rules, and logistics⁵⁰ utilized to achieve policy objectives are also of key importance. The policymaker therefore has no choice but to consider the legislative framework if they truly wish to create effective law.

In many cases, policies are often formulated by the various employees of the ministry based on longitudinal studies. For example, Jamaica’s Ministry of Justice (MOJ) possesses its own Strategic Planning, Policy Research and Evaluation Division whose purpose is to collect information and conduct research that might influence and give rise to public policy.⁵¹ However, policies are initiated and, in some instances, are often fast-tracked by the head of the ministry depending on the incumbent Government’s political agenda, as posited by the United States Agency for International Development (USAID), in its report on Jamaica’s Agenda for Action.⁵² The report also found that stagnation of policymaking and legislative drafting is likely due to the executive arm of the Government’s concentration in compiling policies they may deem relevant. Sir Stephen Laws similarly posits:

Our Parliamentary system gives the bulk of the Parliamentary time available each year for making primary legislation to the Government of the day. Nevertheless that time is still in short supply; and competition between Government departments for a place in the legislative programme is intense. When it comes to the allocation of the limited Parliamentary time, decisions are generally made according to political priorities, subject of course to legal necessities and emergencies.⁵³

⁴⁷ Zamboni at p 422.

⁴⁸ Zamboni at p 420.

⁴⁹ M. Mousmouti, *Designing Effective Legislation* (Edward Elgar Publishing, 2019) at p 10 <<http://dx.doi.org/10.4337/9781788118231>> accessed 26 November 2023.

⁵⁰ Mousmouti at p 10.

⁵¹ Ministry of Justice, “Strategic Planning, Policy Research and Evaluation | Ministry of Justice” (Homepage | Ministry of Justice) <<https://moj.gov.jm/strategic-planning-policy-research-and-evaluation>> accessed 29 November 2023.

⁵² United States Agency for International Development, *Jamaica’s Agenda for Action* (Business Climate Legal and Institutional Reform Diagnostic, USAID, 2008) 56 <https://pdf.usaid.gov/pdf_docs/PNAEA702.pdf> accessed 26 November 2023.

⁵³ S. Laws, “Giving Effect to Policy in Legislation: How to Avoid Missing the Point” (2011) 1 *The Loophole — Journal of the Commonwealth Association of Legislative Counsel* at p 67.

Zamboni also posits that politicians and political agents now place their focus on the policy's external effectiveness, rather than its internal effectiveness. Internal effectiveness zones in on the legal outputs that policy may potentially have on the legislative framework within a legal system, while external effectiveness addresses the effect that the altered legal framework has on the socioeconomic effects of society.⁵⁴ Jamaica is no exception to this rule, considering ministers and Cabinet officials tend to focus on policies they deem relevant in attempts to appease the populace. It is no surprise, then, that Jamaica's Minister of Justice Delroy Chuck has stated: "[w]ith respect to legislation, if ministers take a personal and ministerial interest in their priority legislations, the process becomes easier and speedier for the CPC (Chief Parliamentary Counsel), as policy is clarified and confirmed promptly."⁵⁵

As stated in the Steps In the Legislative Preparation and Presenting of a Public Bill, policy is often conceptualized, chosen and prioritized based upon a series of approvals from various Government and ministerial stakeholders.⁵⁶ Seidman and colleagues posit that, unless policies are properly prioritized, unimportant and time-consuming bills may crowd available drafting capacity, placing desperately needed transformative legislation on the back burner.⁵⁷ This has seemingly occurred in Jamaica, considering the Government has sought to prioritize laws including the *National Identification and Registration Act (NIRA) 2017*⁵⁸ and the *Data Protection Act (DPA) 2020*, while other pieces of legislation like the *Road Traffic Act 2018* and the *Disabilities Act 2014*,⁵⁹ which are essential in resolving pertinent social issues, have received little to no attention.⁶⁰

It has also been argued that one of most challenging aspects, if not the most challenging aspect, of conceptualizing policy is that it has often been deemed the product of law and politics.⁶¹ Jamaica is no exception to this contention. Boswell-Munro contends:

While Governmental policy making in Jamaica does not boast rationality, it constitutes a fusion between rational policy making and political interactions. Government policy problems are usually delegated to a... Minister or Civil Servant who may try to analyze the problem...though the results arrived at may not necessarily be scientific.⁶²

⁵⁴ Zamboni at p 423.

⁵⁵ E. Virtue, "Legal Logjam - Poor Drafting Instructions From Ministries Frustrate Process to Have New Laws Crafted" (*The Gleaner*, 28 February 2021) <<https://jamaica-gleaner.com/article/news/20210228/legal-logjam-poor-drafting-instructions-ministries-frustrate-process-have-new>> accessed 26 November 2023.

⁵⁶ Aitken at p 13.

⁵⁷ Seidman et al. at p 37.

⁵⁸ The constitutionality of the NIRA was successfully challenged in Jamaica's Supreme Court after the Court determined that certain provisions had the potential to breach citizens' right to privacy enshrined in the Jamaican Constitution. The Act was subsequently revised and enacted in the year 2021. A board was also appointed to properly execute the provisions of the Act in March 2024.

⁵⁹ The *Disabilities Act* was passed in 2014 but did not come into effect until 2022. There is also an apparent need for subsidiary legislation and regulations.

⁶⁰ Virtue.

⁶¹ Mousmouti at p 2.

⁶² Boswell-Munro at p 25.

To elaborate on the role of the Legislation Committee, Boswell-Munro further posits that the committee — *which is comprised of various individuals including the Chief Parliamentary Counsel (CPC) and the Attorney General (AG)*⁶³ — bears the primary responsibility of prioritizing policy by approving and rejecting proposals based on their merits. However, while this is an essential function, it is important to note that the committee is almost wholly comprised of political actors who subscribe to the Government’s mandate. For example, the AG, a key member of the entity, has tended to be a member of the Parliament in the past and sometimes serves as the Minister of Justice.⁶⁴ Jamaica’s Constitution also posits that the AG shall to be the principal legal adviser to the Jamaican Government in all affairs.⁶⁵ It can therefore be inferred that there is an inherent bias exhibited by the relevant stakeholders when prioritizing Government policy.

Chapter 2: Adequate Policy Research and Consultation

Research

It has long since been determined that adequate research must be performed in the preliminary stages of policy conceptualization. For example, when submitting the first Cabinet proposal for the Annual Legislative Programme, the policymaker must also examine existent laws recorded in statute books to determine whether new law is necessary.⁶⁶ The policymaker must also have the capacity to analyze existent law by identifying what may be required of new policy ideas.⁶⁷ Any failure to conduct this research may subsequently invite unnecessary risks to the already existent legal system.⁶⁸

The research conducted must also be wholistic in nature by taking into account both legal and social considerations. The context of the issue must therefore be assessed thoroughly, in the hopes of achieving sustainable law. To this end, Aitken argues: “[t]he aim is to collect statistics and other data [to] understand the problem and the policy objective for overcoming the problem in order to inform the decision-making process that determines which action to take to achieve the desired objective.”⁶⁹

Boswell-Munro also theorizes that conducting rational research before formulating policy may lead to a more equitable allocation of resources and even more effective laws.⁷⁰ However, while research is essential, Boswell-Munro does warn that bias from political parties in Jamaica may interfere with rational observations.⁷¹

⁶³ Boswell-Munro at p 17.

⁶⁴ Boswell-Munro at p 17.

⁶⁵ *Constitution of Jamaica*, s 79 (1).

⁶⁶ Mothibatsela et al. at p 1.

⁶⁷ Simamba at p 14.

⁶⁸ Laws at p 69.

⁶⁹ Aitken at p 14.

⁷⁰ Boswell-Munro at p 28.

⁷¹ Boswell-Munro at p 28.

Regardless, while adequate research is essential, it is often not conducted before submitting policy proposals for the Annual Legislative Programme.⁷² Drafters also seemingly fail to conduct sufficient research in the preliminary stages of consultation considering they hardly embark upon researching outside their own law libraries, which usually contain local and regional statutes.⁷³ Perhaps what is even more appalling is the apparent lack of accessible resources required to determine whether new policy is required. The Commonwealth Secretariat and Hewagama, for example, have observed that drafters from small Commonwealth jurisdictions tend to work in offices that possess insufficient legislative writing instruments to function effectively.⁷⁴ Some of these instruments include revised laws, reports, and extensive libraries.⁷⁵

Hewagama goes on to mention that, while modern technology has sought to resolve these issues, there is no longer a genuine appreciation for facilitating a repository of physical resources and laws published and gazetted by the individual country.⁷⁶ These resources do not only include legislation, but other pertinent documents as well. Jamaica's Opposition Leader, Mark Golding, seemingly agrees with this stance, having listed subsidiary legislations, regulations, orders, and tax-related instruments as documents which are in dire need of gazetting.⁷⁷ It is also evident that laws published in the 20th century are often hard to source because of poor legislative practices, resultantly leaving the legislative drafter and the policymaker at a genuine loss. In some instances, policymakers and drafters are even unaware of whether acts or subsidiary legislations are in force due to poor publishing practices.⁷⁸

Consultation

The policymaker must also be sure to consult the necessary stakeholders and legal professionals in deciphering whether the policy is required in theory. Mothibatsela and Wilson have also determined that researching and assessing existent laws requires advice from either the AG or OPC.⁷⁹ It is therefore no surprise that Chief Justice Sykes posited:

The state has vast resources available to it. In modern Jamaica, the executive arm has the Legal Reform Department, the Attorney General's Chambers, the Chief

⁷² Seidman & Seidman at p 111.

⁷³ Seidman et al. at p. 24.

⁷⁴ The Commonwealth, *Evaluation of Commonwealth Secretariat Support to Member Countries on Legislative Drafting* (Evaluation Series No. 97, Commonwealth Secretariat 2015) at p 9.

⁷⁵ Hewagama at p 120.

⁷⁶ Hewagama at p 120.

⁷⁷ H. Burke, "Gov't Says It's Hampered by Weaknesses in Legislative Policy Development" (*Radio Jamaica News Online*, 7 December 2022) <<https://radiojamaicanewsonline.com/local/govt-says-its-hampered-by-weaknesses-in-legislative-policy-development>> accessed 26 November 2023.

⁷⁸ Hewagama, at p 121.

⁷⁹ Mothibatsela et al. at p 1.

Parliamentary Counsel, and other departments and agencies at its disposal to assist in the formulation of policy.⁸⁰

Jamaica's previous AG, Marlene Malahoo-Forte has also stated that the AG and other stakeholder ministries must be consulted in making submission to Cabinet, to gain their insight on the issue being faced.⁸¹ However, while these stakeholders are essential, it is perhaps of paramount importance that parliamentary counsel be consulted well before the policymaker disseminates instructions.⁸² These consultations ensure the policy adequately addresses the main principles of potential drafting instructions.⁸³ Mark Golding also states: "Parliament is just the tip of the iceberg when it comes to legislation. The ministry develops policy, ideally through a process which involves broad consultation."⁸⁴

However, while consultation with these parties is essential, it can be inferred that neither the OPC nor the AGC are often consulted before receiving draft instructions. This especially takes place where the policymaker wishes to fast-track the development of a particular policy in meeting a political mandate. Jamaican policymakers also seemingly tend to embark upon narrower consultation than is required. This is because policymakers from former British colonies have been observed to confer with individuals that they deem important, even though they are required to consult "interested parties" when preparing instructions and layman drafts.⁸⁵

Chapter 3: Instructing the Legislative Drafter

The Role of the Legislative Drafter

While consultation must take place between the policymaker and the legislative drafter in conceptualizing effective policy, collaboration arguably becomes even more essential when instructing the legislative drafter. Mothibatsela and Wilson also posit that before policy proposals are introduced to Parliament, they must be converted into legislative language in the form of a bill.⁸⁶ Unambiguous instructions should therefore be provided to the drafter, considering that the drafter is tasked with the arduous responsibility of using clear and legally sound wording to bring the policy to life.⁸⁷ Hewagama also posits that conducting

⁸⁰ *Julian Robinson v AG of Jamaica*, [2019] JMFC Full 04 [125].

⁸¹ "AG Explains Steps in Legislative Process" (*The Gleaner*, 28 February 2021) <<https://jamaica-gleaner.com/article/news/20210228/ag-explains-steps-legislative-process>> accessed 26 November 2023.

⁸² D. Berry, "Legislative Drafting: Could Our Statutes Be Simpler?" (1987) 8:2 *Statute Law Review* at 100 <<http://dx.doi.org/10.1093/slr/8.2.92>> accessed 26 November 2023.

⁸³ Berry at 100.

⁸⁴ Virtue.

⁸⁵ Seidman et al. at p 23.

⁸⁶ Mothibatsela et al. at p 15.

⁸⁷ Hewagama at p 119.

sufficient research and consultation equips the policymaker with the capacity to provide the drafter with directions of significant assistance.⁸⁸

Resultantly, there is now a clear need for the drafter's role to be fully understood and recognized by policymakers when preparing draft instructions.⁸⁹ To this end, David Hull posits that the drafter's responsibilities cannot be relegated to that of merely drafting law, but rather molding policy into a form suitable for legislation through collaborative efforts.⁹⁰ The policymaker and drafter must therefore have some familiarity with the requisite procedural rules and regulations when submitting and interpreting instructions respectively.⁹¹ However, this is not always the case. For example, Hudson-Phillips expresses:

There is a certain mystique about the legislative process and those involved in it at a technical level. This mystique does not escape the very law-maker or legislator. Very often the elected representative sitting in the Parliament is no better off than the ordinary man in the street.⁹²

The lack of appreciation for the drafter's capacity to draft effective legislation often leaves the drafter with the insurmountable task of interpreting the policy's intentions. Furthermore, instructions provided to the drafter are usually general in nature.⁹³ Seeking to uncover the reasoning for this occurrence, Simamba inquires whether policymakers themselves are pre-occupied with pertinent matters.⁹⁴ The author however subsequently determined that "[i]t is difficult to imagine a ministry or department in a developing jurisdiction that would be busier than a drafting department."⁹⁵

Filling in the Gaps of the Law

It has long been the common school of thought that the legislative drafter played little to no part in the substantive development of policy.⁹⁶ However, this is no longer the case. As aptly put by Seidman and colleagues:

Between "policy" and "legislation", open spaces exist. Just as an architect creatively helps to fill in the open spaces between "house" and the plans and specifications for

⁸⁸ Hewagama at p 119.

⁸⁹ Hewagama at p 119.

⁹⁰ N. Horn, 'Shaping Policy into Law: A Strategy for Developing Common Standards' (2011) 1 *The Loophole — Journal of the Commonwealth Association of Legislative Counsel* at p 41.

⁹¹ Mothibatsela et al. at p 29.

⁹² Hudson-Phillips at p 77.

⁹³ Seidman et al. at p.27.

⁹⁴ Simamba at p 8.

⁹⁵ Simamba at p 8.

⁹⁶ Seidman et al. at p 30.

building it, so a drafter creatively contributes to filling in the open spaces between a policy and the law that aims to put that policy into effect.⁹⁷

Seidman and colleagues further posit that drafters now possess a large discretion⁹⁸ in interpreting policies. This resultantly leaves parliamentary counsel with no choice but to fill in the gaps of the law if effective laws are to be made.

The drafter's role therefore cannot be relegated to that of a mere wordsmith, who simply transcribes law. Instead, parliamentary counsel should now be regarded as effectors of substantive social change, who indulge in piecing together the puzzle known as policy. Charles Peacock seemingly agrees with this stance, having stated the common school of thought is the "most insidious source of confused thinking."⁹⁹ Seidman and colleagues similarly find that "[t]he drafter has small choice but to have the final cut on the Bill's design — including the details that define the Bill's 'policy'. The devil indeed lies in those details."¹⁰⁰

It can also be deduced that the drafter who strictly takes on the role of "wordsmith" may leave the drafted bill fraught with technical errors, no matter how beautifully worded the document is.¹⁰¹

Policy development and legislative drafting are therefore now intrinsically linked, considering drafters now possess substantive and technical roles.¹⁰² Considine similarly propounds parliamentary counsel often possesses the dual responsibility of policymaker and drafter in countries which lack the requisite resources.¹⁰³ Delroy Chuck has also seemingly arrived at a similar conclusion:

The first challenge is for the ministries to provide precise, clear and fulsome drafting instructions to the CPC, which would allow the drafter to know and understand the policy position, the intent, purpose and width of the proposed law... Cabinet ministers, who are the policymakers, have not paid sufficient attention to the process of crafting or updating laws, often leaving technocrats to legislative mind-reading.¹⁰⁴

Mark Golding has also stated that Jamaica's legislative drafters are often tasked with the responsibility of filling in policy gaps, which is not their function.¹⁰⁵

Policymakers have also been known to provide minuscule instructions to the legislative drafter. Such occurrences can be observed where drafters cite or wholly rely on a similar

⁹⁷ Seidman et al. at p 27.

⁹⁸ Seidman & Seidman at p 111.

⁹⁹ J.C. Peacock, *Notes on Legislative Drafting* (REC Foundation, 1961) at p 3.

¹⁰⁰ Seidman & Seidman at p 112.

¹⁰¹ Horn at p 42.

¹⁰² Seidman et al. at p 27.

¹⁰³ Considine at p 8.

¹⁰⁴ Virtue.

¹⁰⁵ Virtue.

statute produced by another jurisdiction, after merely being told to “adapt it” by the policymaker.¹⁰⁶ Such action resultantly forces the drafter to vet and assess whether the law can even be imported into the country’s existent legislative framework,¹⁰⁷ in light of the fact that the drafter is not presented with an original policy proposal.

Rushing the Legislative Drafter

While parliamentary counsel is expected to begin working on a bill as soon as possible,¹⁰⁸ there have been occurrences where the drafter is instructed by the policymaker to complete the desired bill in unreasonable time frames.¹⁰⁹ Rushing the drafter subsequently has the potential of producing ineffective laws in need of re-assessment. Jamaica is no exception to this issue either, considering the Government has been chided by critics for speed running many bills through Parliament.

The Law Reform (Zones of Special Operations) (Special Security and Community Development Measures) Act 2017, for example, was subject to criticism for the Government’s failure to strengthen the bill after issues were found with the proposed law’s first draft.¹¹⁰ In response to these contentions, Delroy Chuck contended that “[o]ftentimes when legislation comes up we have to consider policy directives, consider changes, and within a matter of minutes or hours we have to do these changes.”¹¹¹

In similar fashion the *NIRA 2017* received heavy pushback from the parliamentary opposition for concerns regarding the Government’s proposed handling of citizens’ personal data. While the legislation had the potential to effect mass social change, it was contended that an important secondary piece of legislation, the *DPA 2020*, should have been implemented by the Government first.¹¹² The Government’s failure in enforcing the *DPA 2020* subsequently meant that the personal data collected under the *NIRA 2017* would have no means of protection or oversight.¹¹³ Had the Government taken the necessary steps to implement the *DPA 2020* before rushing the *NIRA 2017*’s implementation, the requisite

¹⁰⁶ D. Hull, “The Role of Legislative Counsel: Wordsmith or Counsel?” (2008) 1 *The Loophole— Journal of the Commonwealth Association of Legislative Counsel* at p 36.

¹⁰⁷ Boswell-Munro at p 48.

¹⁰⁸ Mothibatsela et al. at p 21.

¹⁰⁹ Seidman & Seidman at p 127.

¹¹⁰ A. Saunders, “Government Accused of Rushing Special Crime Zones Bill” (*Jamaica Observer*, 28 June 2017) <www.jamaicaobserver.com/news/Government-accused-of-rushing-special-crime-zones-Bill/> accessed 29 November 2023.

¹¹¹ Saunders.

¹¹² H.S. Dunn, “Risking Identity: A Case Study of Jamaica’s Short-Lived National ID System” (2020) 18:3 *Journal of Information, Communication and Ethics in Society* at p 331 <<http://dx.doi.org/10.1108/jices-04-2020-0040>> accessed 29 November 2023.

¹¹³ Jamaicans for Justice, “The New NIDS: An Opportunity to Do Things Differently — Jamaicans for Justice” (*Jamaicans for Justice*, 28 October 2020) <<https://jamaicansforjustice.org/the-new-nids/>> accessed 29 November 2023.

framework would have been established. It is therefore no surprise that the law was struck down by the Supreme Court in *Julian Robinson*.¹¹⁴

Legislative drafters are also often instructed to simplify legislation, by making bills shorter and easier to comprehend.¹¹⁵ It is likely that policymakers will take such action to fast-track the implementation of policy.¹¹⁶ However, while there is an apparent need to make Jamaican laws accessible and easy to decipher by the public,¹¹⁷ it must be noted that legislation is inherently complex, considering the law utilizes institutional frameworks and logical structures¹¹⁸ — like legislative handbooks¹¹⁹ — when preparing draft bills. Legislative drafters resultantly have no choice but to strike a balance between the will of the policymaker and the nomenclature of existent legal frameworks¹²⁰ when given these instructions.

Though drafters face outside pressure to produce legislation, unless the bill gives effect to the general objective of the policy,¹²¹ the law is virtually useless, and may very well be subject to future challenges. It is therefore no surprise then, that Barnes, in assessing *Smoker v Pharmacy Restructuring Authority*¹²² states that “[a] primary source of doubt then appears to be poor drafting — poor word choice — which led to interpreters taking different positions on basal legal considerations.”¹²³

As such, while simple legislation may be easier to understand, policymakers must be mindful of potential scrutiny that the legislation may be placed under by the courts.¹²⁴

Chapter 4: Sufficient Drafting Capacity

Quantity of Legislative Drafters

Perhaps one of the most trying issues being faced by Jamaica is the severe deficiency in experienced legislative drafters¹²⁵ required in facilitating effective legislation. In comparing

¹¹⁴ *Julian Robinson v The Attorney General of Jamaica*, [2019] JMFC Full 04.

¹¹⁵ Berry at p 95.

¹¹⁶ Berry at p 95.

¹¹⁷ A. Sumner, “Malahoo Forte pushing for simpler language in Jamaican laws” (*Jamaica Observer*, 28 April 2023) <www.jamaicaobserver.com/news/malahoo-forte-pushing-for-simpler-language-in-jamaican-laws/> accessed 29 November 2023.

¹¹⁸ Aitken at p 25.

¹¹⁹ Mothibatsela et al. at p 18.

¹²⁰ Berry at p 94.

¹²¹ Aitken at p 25.

¹²² *Smoker v Pharmacy Restructuring Authority*, (1994) 53 FCR 287.

¹²³ J. Barnes, “When ‘Plain Language’ Legislation Is Ambiguous — Sources of Doubt and Lessons for the Plain Language Movement” (2010) 34 *Melbourne University Law Review* 671, <https://law.unimelb.edu.au/_data/assets/pdf_file/0003/1703532/34_3_1.pdf> accessed 29 November 2023.

¹²⁴ Berry at p 93.

¹²⁵ Simamba at p 3.

smaller developing countries to larger states that boast increased resources, David Hull concludes that smaller states are often significantly disadvantaged, since technical expertise is not always readily available.¹²⁶ Hull further posits that few lawyers opt to pursue careers in public law, and even fewer have a desire to be legislative drafters.¹²⁷

As posited earlier, the legislative drafter must become involved in the legislative process well before parliamentary introduction. However, while drafters are essential, the number of legislative drafters within the ranks of Jamaica's OPC must be increased. Senator Natalie Campbell Rodrigues for example, during the State of the Nation Debate in 2022, stated:

If we are to approach the creation and passing of new, and the revision of older legislation, in a sustainable manner we must streamline our systems. The country needs more legislative drafters. Each ministry needs at least one highly capable and trained legal officer with skill in legislative drafting.¹²⁸

The senator also highlighted various pieces of legislation in need of urgent review, some of which are currently stalled at the parliamentary introduction stage of the legislative process. These pieces of legislation include the *Domestic Violence Act 1996*, the *Occupational Health and Safety Act 2017* and the *Child Care and Protection Act 2004*.¹²⁹ Mark Golding has also made similar comments, having petitioned for the introduction of more parliamentary counsel considering Jamaica clearly lacks the requisite number of professional drafters per capita of the nation's population.¹³⁰

Hewagama also posits that the lack of support staff causes legislative drafters to be stretched thinly across the board. He states:

Due to the scarcity of junior drafters and support staff, the drafter is required to personally supervise and follow through the entire process of finalisation of the Bill with the Government Printer, which includes proof-reading, visiting the printers, supervising the typesetting, formatting, etc.¹³¹

There are many reasons for the apparent lack of drafters. Firstly, legislative drafters tend to endure unsatisfactory working conditions and poor pay.¹³² Simamba similarly states that lawyers in the public sector do not receive pay anywhere near that of lawyers in private practice.¹³³ It is therefore no surprise that while attorneys may initially join the OPC, many

¹²⁶ Hull at p 35.

¹²⁷ Hull at p 35.

¹²⁸ A. Sumner, "Senator Calls for More Legislative Drafters" (*The Jamaica Observer*, 10 December 2022) <www.jamaicaobserver.com/news/senator-calls-for-more-legislative-drafters/> accessed 26 November 2023 [Senator Calls for More Legislative Drafters].

¹²⁹ .Senator Calls for More Legislative Drafters.

¹³⁰ Burke.

¹³¹ Hewagama at p 120.

¹³² Hewagama at p 121.

¹³³ Simamba at p 3.

often leave the office's ranks in favour of occupations in the private sector.¹³⁴ Legislative drafters also receive little to no recognition for their efforts in contributing to the good governance of society. Instead, the policymaker and judges are often seen as the face of the law.¹³⁵

Quality of Legislative Drafters

There is also an apparent need for competent drafters with the requisite skillset to adequately draft legislation on a consistent basis across the country. As stated earlier, the process of producing effective law is wholly dependent on the drafter's capacity to combine legal, technical and political knowledge in achieving the intended policy objective.¹³⁶

Parliamentary counsel must therefore receive adequate training to better understand how legislation operates in a prescribed legal system.¹³⁷

To ensure the quality of legislative drafting is upheld, Commonwealth Caribbean countries have sought to put measures in place. In Jamaica's case, fresh drafters are assigned to senior members of the OPC. These senior drafters subsequently train the juniors and provide them with guidance based upon the experience gathered over the years of preparing legislation.¹³⁸

Public forums inclusive of training seminars have also been implemented. For example, the Commonwealth Fund for Technical Co-operation (CFTC) Legislative Training Programme, headed by the Commonwealth Secretariat, has been continuously facilitated over the last 30 years in attempts to attract new recruits and provide more training to officers already employed by the Government.¹³⁹ The programme has yielded some success, with workshops being hosted in Barbados and Jamaica. Also, the University of the West Indies (UWI) Cave Hill Campus has also established several means by which the quality of legislative drafting ought to be improved. Firstly, the Improved Access to Justice in the Caribbean (IMPACT Justice), located within the UWI Cave Hill Faculty of Law's Caribbean Law Institute Centre, sought to promote sustainable legislative drafting and policy development by issuing various publication and hosting several educational forums.¹⁴⁰ Simamba also lauds the UWI Cave Hill Campus for offering a Masters in

¹³⁴ Hewagama at p 121.

¹³⁵ Mousmouti at p 2.

¹³⁶ United States Agency for International Development at p 60.

¹³⁷ Keyes & Dewhurst at p 23.

¹³⁸ Hewagama at p 121.

¹³⁹ D. McClean, "Ten Years of the CFTC Legislative Drafting Training Programme" (1985) 11(1) *Commonwealth Law Bulletin* at p 226 <<http://dx.doi.org/10.1080/03050718.1985.9985797>> accessed 26 November 2023.

¹⁴⁰ University of the West Indies at Cave Hill, "Centres - Improved Access to Justice in the Caribbean (IMPACT Justice)" (*The University of the West Indies at Cave Hill, Barbados - Home*) <www.cavehill.uwi.edu/Law/about-us/centres.aspx> accessed 30 November 2023.

Legislative Drafting to further increase the expertise of lawyers trained in this area, more so working within the Caribbean region.¹⁴¹

Chapter 5: Recommendations

Ensuring Proper Consultation between the Legislative Drafter and the Policymaker

It has become increasingly evident that consultation must take place between the policymaker and the legislative drafter at an early stage. Aitken further posits that the designing of legislation is a collaborative process between both parties, who work progressively with one another to produce quality law.¹⁴² However, while this is the ideal, proper consultation almost never takes place. Measures must therefore be undertaken by Jamaica's MOJ to delay Cabinet submissions at stage 1 of the legislative process, unless the OPC gives professional advice on the proposed policy. To this end, it is reassuring that Delroy Chuck has admitted "[i]f the relevant portfolio minister gets involved from an early stage, the legislation would take months instead of years, redrafted two or three times instead of six or eight times, and ensure that it returns quickly to the CPC instead of lagging in the ministries."¹⁴³

Minister of Justice Delroy Chuck further promised the *Sunday Gleaner* that his ministry is now working assiduously to ensure that more bills are tabled in Parliament where consultation is facilitated at an early stage.¹⁴⁴

Greater Utilization of the Legislative Production Management System (LPMS), the Legislative Policy Manual, the Legislative Drafting Manual and Draft Instruction Templates

In May, 2015 it was reported that the way Jamaica's laws are drafted would significantly improve based on the introduction of the Legislative Production Management System (LPMS), the *Legislative Policy Manual* and the *Legislative Drafting Manual*, inclusive of Draft Instruction Templates.¹⁴⁵ Firstly, the LPMS aims to facilitate efficient and effective legislation by connecting the various departments and entities involved in the legislative process through a singular piece of software.¹⁴⁶ Second, the *Legislative Policy Manual* was formed with the aim of developing sound policy by various ministries across the board,

¹⁴¹ Simamba at p 5.

¹⁴² Aitken at p 26.

¹⁴³ Virtue.

¹⁴⁴ Virtue.

¹⁴⁵ A. Smith-Edwards, "Legislative Policy Manual Expected to Improve Development of Laws – Jamaica Information Service" (*Jamaica Information Service – The Voice of Jamaica*, 5 May 2015) <<https://jis.gov.jm/legislative-policy-manual-expected-improve-development-laws/>> accessed 26 November 2023.

¹⁴⁶ R. Williams, 'Legislative Production System and Drafting Manual Launched | Jamaica' (*Permanent Missions Permanent Mission to the United Nations*, 14 June 2017) <www.un.int/jamaica/fr/news/legislative-production-system-and-drafting-manual-launched> accessed 26 November 2023.

leaving “little room for gaps” in the law.¹⁴⁷ Lastly, the *Legislative Drafting Manual* serves the purpose of enhancing parliamentary counsel’s technical skills when compiling draft bills, by acting as a supplementary guide.

The management system and both manuals were subsequently launched in June, 2017 by Delroy Chuck, with the hope that both the policy development and legislative drafting processes would improve drastically.¹⁴⁸ On July 2, 2020, the OPC also published new draft instruction templates to be disseminated to Government ministries. This move was made to provide policymakers with the requisite information needed when giving clear instructions to legislative drafters.¹⁴⁹ The Jamaica Information Service further reported that the OPC was in the process of “rolling out” the LPMS to the various ministries, departments, and agencies under the Government’s umbrella on November 12, 2020.¹⁵⁰

However, while these mechanisms and resources are clearly existent, and have been developed over the course of several years, it is evident that they are not fully appreciated, nor are they being utilized effectively. This can be observed considering the criticisms of various modern statutes mentioned in the previous chapters. Several comments have also been made by both government and opposition parliamentarians on the inadequacies of the legislative process in the last three years. It is therefore likely that a stricter application and enforcement of these three resources ought to be facilitated by the OPC.

Greater Oversight Exhibited by the Ministry of Legal and Constitutional Affairs (MLCA)

The MLCA, formed in January 2022 has seemingly taken an active role in overseeing and improving the legislative process. Acting Permanent Secretary for the Ministry, Wayne Robertson, has stated the Ministry has taken steps to facilitate greater policy development by training Cabinet staff in collaboration with the Policy Analysts’ Network (PAN).¹⁵¹ Head of the Ministry, Ms. Marlene Malahoo-Forte, echoes these statements, having expressed that the Ministry aims to build the capacity of policymakers by hosting a training course in the first quarter of the 23/24 financial year.¹⁵²

Mr. Robertson further made mention of his intentions for the Ministry to manage and regulate the production of the Government’s legislative programme to ensure that only effective policy is approved.¹⁵³ Malahoo-Forte also stated that, under her leadership, “[t]he practice of rushing laws through to the Attorney General’s Department (AGD), the Office of

¹⁴⁷ Smith-Edwards.

¹⁴⁸ Williams.

¹⁴⁹ T. Wheelan, “Office of Parliamentary Counsel Develops New Legislative Drafting Templates” (*Jamaica Information Service – The Voice of Jamaica*, 2 July 2020) <<https://jis.gov.jm/office-of-parliamentary-counsel-develops-new-legislative-drafting-templates/>> accessed 26 November 2023.

¹⁵⁰ Wheelan.

¹⁵¹ Wheelan.

¹⁵² Burke.

¹⁵³ Wheelan.

the Chief Parliamentary Counsel (OCPC), and the Legal Reform Department (LRD) as deadlines approach, will be a thing of the past.”¹⁵⁴

It is therefore advised that the MLCA follow through on these mandates, considering it is now placed in the prime position to streamline and improve the Jamaican legislative process.

Utilizing Other Forums to Execute a Policy Outside of Legislation

As stated in Chapters 2 and 3, where existent legislation addresses a proposed policy issue, there is no immediate need for said policy to be converted into law. Xanthaki posits that, when this occurs, the initial proposal need not be discarded, but instead should be facilitated via regulatory reforms and subsidiary legislation that can be more easily established under the existent legal and political framework.¹⁵⁵

Developing an Objective Framework that Assesses the Effectiveness of Public Policy

While the Legislation Committee assesses and prioritizes Government policy, it has now become clearer that there is a need for greater guidance prioritizing policy. As previously mentioned, the Committee is comprised of state actors who are often politically aligned to the reigning Government. Aitken suggests that policy proposals should be identified and prioritized by independent and international organizations, who subsequently advise the Government on the requisite policies required to achieve an overall objective that aligns with national interests and political goals. Taking this approach would facilitate the formulation of policy, and the law would be informed by realities, not intuition.¹⁵⁶

Affording an Exclusive Pay Structure for Legislative Drafters

Hewagama posits that affording drafters with an attractive pay structure may incentivize lawyers to join a separate cadre of highly skilled drafters within the ranks of the OPC.¹⁵⁷ Simamba further states that other jurisdictions have attempted to liken the position of Chief Parliamentary Counsel to that of a Supreme Court judge, resultantly raising the value and ranking of drafters in the OPC.¹⁵⁸ However, it is important to note that such a solution may simply not be feasible, due to the government’s incapacity to facilitate the disbursement of increased remuneration.¹⁵⁹

¹⁵⁴ A. Sumner, "Major Law Revision" (*Jamaica Observer*, 19 January 2022) <www.jamaicaobserver.com/news/major-law-revision/> accessed 30 November 2023.

¹⁵⁵ Xanthaki at p 432.

¹⁵⁶ Mousmouti at p 8.

¹⁵⁷ Hewagama at p 121.

¹⁵⁸ Simamba at p 5.

¹⁵⁹ Simamba at p 5.

Publication of Draft Instructions

Hudson also posits that the publication of instructions provided by the policymaker to the legislative drafter may subsequently hold both parties accountable to the everyday citizen in producing effective law.¹⁶⁰ Taking such action will not only ensure that the instructions provided are clear, concise, and unambiguous, but will also place the drafter's actions under scrutiny in producing a draft bill based on the policy proposed.

Conclusion

In scrutinizing the intricate relationship between policy and legislation within the Jamaican context, it is clear that multifaceted processes underpin the formulation of laws. By shedding light on gaps in the legislative process, and exploring the dynamics between policymakers and legislative drafters, several inefficiencies and challenges have been observed which impede the effective transition of policy into law. It has now become evident that comprehensive and systemic reforms are imperative to fortify the legislative landscape in Jamaica.

Firstly, policies must be carefully developed and possess clear objectives in addressing identified problems. Scholars including Zamboni, Keyes, Dewhurst, Seidman and colleagues, and Abeyesekere have offered different perspectives on what are the true markers of effective policy. The consensus is that the means and mechanisms by which policy achieves desired outcomes is the determinate factor. However, Jamaica has consistently failed to conceptualize effective policy, considering ministries and political parties tend to fast-track policy to meet political agendas. It is also evident that there are inherent biases in approving the prioritizing of Government policies upon assessing Jamaica's legislative process. To address these challenges, it is recommended that a more comprehensive and objective approach to policy conceptualization be established. Policymakers should not solely prioritize external effectiveness, but also consider internal effectiveness. This can be achieved by involving independent and international organizations in identifying and organizing policy proposals. Greater utilization of the *Legislative Policy Manual* developed by the MOJ and hosting training sessions administered by the MLCA will also help resolve this issue.

Secondly, a recurring theme throughout this paper is the indispensable role of research and consultation in the policymaking and legislative drafting stages. Stages 1 and 2 of Jamaica's legislative process clearly highlight the need for this occurrence. The policymaker is therefore advised to examine existing laws recorded in statute books to determine the necessity of new laws. Where there are already existent laws, it is advised that the Government utilize other forums to execute a policy outside of legislation. The MLCA should further implement measures to facilitate increased access to primary and secondary resources and laws. While recognizing the significance of involving various stakeholders,

¹⁶⁰ Hudson-Phillips at p 79.

from policymakers to the AG, it is also apparent that the current practices fall short of ideal standards. The reluctance to engage the OPC and the AGC before receiving draft instructions, especially in fast-track scenarios, poses a considerable impediment. Opposition leader Mark Golding rightly emphasizes the need for broader consultations during policy development. To address this, a paradigm shift is essential, emphasizing early and inclusive engagement of all pertinent parties, fostering a collaborative approach from the onset. Broad oversight by the MOJ and the MLCA alongside increased utilization of the LPMS can aid in facilitating this consultation.

Thirdly, it can now be observed that the legislative drafter is not merely a transcriber of law, but rather a collaborator in molding policy into a form amenable to legislation. The lacuna in appreciating the drafter's capacity often results in vague instructions and poor policy conceptualization, leaving the drafter with the daunting task of interpreting the policymaker's intentions. Adequate training and understanding of procedural rules, regulations, and statutes are vital for both policymakers and drafters. This can be achieved by relying on the draft instruction templates provided by the OPC, and increased oversight from the MLCA. Instances where legislative drafters are instructed to expedite the process within unreasonable timeframes also often result in flawed laws. The practice of rushing bills through Parliament also jeopardizes the quality and effectiveness of legislation. The criticism faced by the Government for hastening bills like the *NIRA 2017* and the *Law Reform Act 2017* without due diligence emphasizes the need for a more meticulous and deliberate legislative process. It is therefore reassuring that the Minister of Justice and the Minister of Legal and Constitutional Affairs have recently established measures to prevent this from occurring in the future.

Lastly, one of the most pressing issues identified while conducting this research is perhaps the severe deficiency of experienced legislative drafters within the Jamaican context. There is now a clear need for a more substantial number of skilled drafters to facilitate efficient legislation. Suggestions from Senator Natalie Campbell Rodrigues and Opposition Leader Mark Golding regarding the urgent need for additional drafters indicate a consensus on this matter. The scarcity of drafters, coupled with inadequate support staff, stretches drafters thin across responsibilities, affecting the overall quality of legislation. To combat this issue, it is recommended that legislative drafters be awarded an exclusive pay structure to incentivize more participation of lawyers in the sphere of public law. Existent methods of training drafters from the UWI, CFTC and the Commonwealth Secretariat should also be continued.

Revising Law Revision: Jersey’s New Approach to Improving the Statute Book

Lucy Marsh-Smith¹



Abstract

Jersey has had law revision powers on the statute book since 2003, which were used to empower the 2004 revised edition of the laws of Jersey and then annual editions until 2019. These editions consolidated the legislation once a year and made limited additional changes. Now that Jersey legislation is always kept up-to-date, the law revision powers, re-enacted in the Legislation (Jersey) Law 2021, can be used to greater effect to improve the statute book.

Law Revision (Jersey) Law 2003

The Law Revision (Jersey) Law 2003 (“the 2003 Law”), which gave authority for Jersey’s first law revision in 2004, established the Law Revision Board consisting of two politicians, the Attorney General, the parliamentary clerk for Jersey who is known as the Greffier of the States, the Law Draftsman² and the Law Revision Manager, who was contracted to do the work of law revision.³ The Board was tasked to prepare and bring into force a complete revised edition and maintain it by preparing and bringing into force updates to it.⁴

Under Article 3 of the 2003 Law, the complete revised edition consisted of:

¹ Principal Legislative Drafter, Jersey. This article is based on a presentation at the CALC Conference held in Jamaica in May 2024.

² Now Principal Legislative Drafter, see Legislation (Jersey) Law 2021 at art 19(3).

³ 2003 Law at art 2(1).

⁴ 2003 Law at art 2(3).

- (a) all Laws passed or made in Jersey that were in force on the revision date and not omitted under arts 4 or 5;
- (b) legislation of the Parliament of the United Kingdom and Orders in Council applicable to Jersey considered by the Board desirable to include;
- (c) the treaties, conventions and Community instruments relevant to Jersey that the Board considered desirable to include;
- (d) an index of its contents; and
- (e) the introductory and explanatory material and tables that the Board considered desirable to include.

Under Article 4 and Schedule 1, the following were omitted from the revised edition, though, under Article 9(7), this did not affect their operation:

- (a) private Laws;
- (b) Laws conferring pensions or gratuities on individual persons;
- (c) Laws of a temporary nature or under revision;
- (d) Laws the carrying into effect of whose provisions was doubtful;
- (e) Laws according acts of incorporation or converting trusts to public trusts;
- (f) subordinate legislation made under a Law omitted under paras (a)–(e);
- (g) subordinate legislation of temporary effect or which did not appear to the Board to be of sufficient importance to be included;
- (h) Schemes or Representations ratified by the Crown on the recommendation of the Church Commissioners for England or, formerly, the Ecclesiastical Commissioners for England;
- (i) enactments omitted from an earlier republication of a volume of the *Recueil des Lois de Jersey* or of the Regulations and Orders of Jersey.⁵

The important thing to remember about a law revision, in the sense we generally use the term in the Commonwealth, is that it cannot alter the legal effect of legislation.⁶ Revised legislation is not passed or approved by a legislature because it does not change any legal effect. The powers are concerned with improving the appearance and readability of the statute book, but this is a broad concept. It includes all the changes needed to keep the statute book current. It encompasses, for example, all the necessary changes when Ministerial functions are transferred and changing the structure of definitions, in fact a range of things affecting the cohesion of the statute book. The 2003 Law included power to omit repealed and spent laws, repealing provisions, preambles, provisions bringing laws into

⁵ There had been an unofficial reprint in 1973 which was used as the base point for the 2004 law revision.

⁶ In Jersey this is confirmed by art 5(2) of the 2003 Law.

operation and amending laws where amendments have been embodied, and words of enactment.⁷ The full range of powers included in the 2003 Law, as listed in Schedule 2, included powers to add or change titles, consolidate or split laws or relocate provisions, add a table of contents, add or alter headings, omit maps, diagrams etc, update names, make words gender neutral, correct errors, spelling or punctuation, change expressions of date, money, time, units of measurement and conjunctives and disjunctives, omit obsolete and redundant words, ensure uniformity of expression, shorten or simplify sentences, add and change numbering, update references to other legislation and correct cross references. Finally, there was power to do all other things which appear to the Board to be necessary to render the revised edition consistent with current law drafting practice and to perfect the revised edition.

The 2004 Revised Edition

The 2003 Law gave statutory authority to prepare and bring into force the 2004 revised edition, a huge step forward in access to Jersey legislation. The revised edition came into force on 1st July 2004, showing the law as it was on 1st January of that year. It consolidated all amendments, bringing the statute book up-to-date, and was published electronically as well as in paper edition. The entire statute book, with very few exceptions, was renumbered to remove the complex lettering where extra articles had been inserted over time. Everything was made gender neutral by the standards of the day, either by repeating the noun or by replacing “he” with “he or she”. Certain laws were renamed and some provisions were moved into other laws where this was more appropriate. In addition, where interpretative provisions were no longer needed due to general provisions having been inserted into the Interpretation (Jersey) Law 1954, they were removed.

The 2004 revised edition was published online on the Jersey Legal Information Board website.⁸ It was brought into force by the Board signing paper copies and publishing a notice in the Jersey Gazette. By virtue of Article 9 of the 2003 Law, the revised edition was deemed to be the sole authentic edition of the laws of Jersey in respect of the law contained in it and in force on the revision date. Thereafter, relying on the powers in the 2003 Law, the revised edition was updated each year. Article 10 enabled updating by means of entire replacement, hence the complete versions published each year from 2005 to 2019. The new version usually came out on 1st April each year, showing the law as it was at the beginning of the year. Most of the changes were consolidations resulting from writing in the amendments that had taken place during the previous year, but some corrections were made using the law revision powers.

⁷ The permitted omissions were listed in paragraph 1 of Schedule 2 to the 2003 Law.

⁸ Now at <www.jerseylaw.je>.

Limitations of the Law Revision Practice and Move to Continuous Consolidation

No-one should doubt the huge steps taken in the early 2000s, first to capture all Jersey legislation electronically and then to bring it up to date. Many small Commonwealth jurisdictions have law revisions that update their statute books every ten years or with an even longer interval, but from 2004 onwards the Law Draftsman's Office⁹ updated the statute book every year. But standards in the publication of legislation do not stand still. For some years the gold standard was to consolidate legislation as it changed to ensure the statute book was always up-to-date and that was the author's mission on taking on the running of the office.

2019 was the year of the last law revision update¹⁰. Taking that version of the statute book, preparing and publishing consolidations began as soon as laws were amended. Because the only legislated authorised version was the signed revised edition, these up-to-date versions were labelled as "unofficial" consolidations. There was some concern expressed from various quarters of users that these "unofficial" consolidations were less authentic than the "official" revised edition. This, however, ignored the fact that the revised edition was, in reality, only authenticated as at the 1st of January of the year to which it related. It was not published until three months later, so the website was always between three to fifteen months out of date, requiring the user to make their own unofficial consolidation in the case of any changes to legislation made since that 1st of January. The use of the new "current law" edition, which was prepared by the same people as the old law revision, was therefore encouraged.

Since the revised edition was no longer being updated, in time users grew to trust the new current law system. Unlike the revised edition, it covers all Jersey legislation that is still in force and not spent. More importantly, it is always completely up-to-date. It was indeed fortunate this happened before the pandemic hit. At that time the relevant legislation was often changing daily, its effect included severe restrictions on people's liberty, and it was important that all the Covid legislation was published and consolidated so that at any time people could always find the current state of the law that applied.

Legislation (Jersey) Law 2021

The next step was to make the current law version authorised for citing in court, and that spawned the Legislation (Jersey) Law 2021 ("the Legislation Law") which came into force on 28 September 2021. This Law brought together all existing provisions about making, revising and publishing legislation and expanded them to cover consolidation. Part 2 covers the making, amending and repealing of Jersey legislation and largely contains provisions that were in the Interpretation (Jersey) Law 1954. Part 4 places the Legislative Drafting

⁹ Now renamed the Legislative Drafting Office, see Legislation (Jersey) Law 2021 at art 19(1).

¹⁰ Though the 2003 Law was still in force at this stage the duty on the Law Revision Board under Article 2(3) was complied with on the bringing into force the 2004 revised edition. There was a power to prepare and bring into force updates to it but no duty to do so. Once legislation was being consolidated the main purpose of these updates was removed.

Office on a statutory footing and imposes statutory functions on the Principal Legislative Drafter. But it is Part 3, about consolidating, publishing and revising legislation, that is relevant to this paper.

Article 13 of the Legislation Law imposes a duty to consolidate:

13 Consolidated legislation

- (1) When any Jersey legislation ... is commenced, amended or revised ... the Principal Legislative Drafter must, as soon as practicable, prepare a consolidated version of the legislation.
- (2) Consolidated legislation must include a statement that it is consolidated legislation compiled under the authority of this Law.

Article 14 contains provisions giving the Principal Legislative Drafter statutory authority to make editorial changes:¹¹

14 Editorial changes

- (1) The Principal Legislative Drafter may make the following changes to consolidated legislation (whether when preparing it or later) —
 - (b) the removal of a provision relating to its commencement;
 - (c) the removal of a provision that amends or repeals other legislation (or any provision of that other legislation);
 - (d) the removal of any other provision that the Principal Legislative Drafter considers to be spent or for any other reason to be no longer operative;
 - (e) the correction of —
 - (i) typographical and clerical errors,
 - (ii) errors in grammar, spelling and punctuation,
 - (iii) errors in numbering, cross-referencing, and alphabetical ordering,
 - (iv) errors in, or arising out of, an amendment by other legislation to the legislation being consolidated, and
 - (v) any other errors of a similar nature;
 - (e) changes in punctuation and the relocation of conjunctives or disjunctives to enable the addition or removal of any provision that is or was part of a list of provisions.
- (2) However, none of these changes has effect to the extent of changing the meaning of any provision.

¹¹ In practice, the authority to make editorial changes is delegated to the Legislation Editor under the power set out in Article 21.

- (3) The Principal Legislative Drafter may make formatting and presentational changes to the legislation so that consolidated legislation is consistent with current drafting practice.
- (4) Nothing in this Article limits the authority to make changes in preparing consolidated legislation in reliance on the application of any other legislation.
- (5) Changes authorised by this Article that are made to consolidated legislation, other than formatting and presentational changes or minor editorial changes, must be set out in an endnote or other suitable place.
- (6) The Principal Legislative Drafter may correct any errors in a published version of as-enacted legislation that occurred after it is made or in revised legislation that occurred after its revision.

There is also a duty on the Principal Legislative Drafter to publish legislation:

16 Publication of legislation

- (1) The Principal Legislative Drafter must ensure that the following are published —
 - (b) all as-enacted legislation made after the commencement of this Part;
 - (c) all consolidated legislation prepared after 1st January 2019.¹²
- (2) As-enacted legislation must be published as soon as practicable after it is made and consolidated legislation must be published as soon as practicable after it is consolidated or the amendments resulting from other legislation are incorporated within it, whichever is the later.

And the following provision covers official versions of legislation:

17 Official versions of legislation

- (1) All as-enacted legislation is an official version of the legislation.
- (2) Any consolidated legislation that is Jersey legislation is an official version if it contains a statement that it is an official version of the legislation issued under the authority of this Law and —
 - (a) it is an electronic version of the legislation displayed on a website under the authority of the Principal Legislative Drafter (or a printed or downloaded version of that legislation without any alteration to its text or format); or
 - (b) it is a printed version of the legislation issued by or on behalf of the Principal Legislative Drafter.
- (3) An official version of as-enacted legislation is taken to set out correctly the text of the legislation.

¹² This was the date of the final revised edition published under the 2003 Law.

- (4) Subject to Article 15(8) (changes made by revision have effect as if effected by amendment), an official version of consolidated legislation, unless the contrary is shown, is taken to set out correctly, as at the date on which it is stated to be consolidated, the legislation as enacted and including any current amendments to it, or revisions of it.
- (5) An official version of legislation is admissible in evidence in any proceedings and a court or person acting judicially must take judicial notice of any official version of legislation.
- (6) The States may, by Regulations, amend paragraph (2) to vary the requirements for legislation to be an official version.

Thus the Legislation Law now requires Jersey legislation to be consolidated, updated editorially within limited powers to fix routine matters and published in consolidated form. If certain conditions are satisfied, consolidated legislation will be an official version able to be cited in court, as was the case with the former revised edition. The difference is that, because it is up to date, it can actually be relied on in court contemporaneously. However, the Legislation Law, though it repealed the 2003 Law,¹³ did not mark the end of law revision in Jersey.

New use of law revision powers

It was considered very important to maintain the law revision powers, so under Article 15 of the Legislation Law, the Law Revision Board is continued. The composition of the Board is the same except there is no Law Revision Manager. Instead, the preparation of revised legislation is done in house by the editorial team under the supervision of a drafter. The statutory power is given to the Principal Legislative Drafter to prepare a draft revision to any Jersey legislation using powers similar to those in the 2003 Law. The draft revision is then submitted to the Board to certify. Instead of replacing whole instruments or the whole statute book, the new system of law revision focuses on the actual provisions that need to change, making the revision work much more targeted. Once approved, law revision changes are consolidated in the same way as amendments to legislation.

It is important to note that the new law revision practice is not about consolidation, because that is now done separately and continuously. Rather it is about making changes and improvements to the statute book. As before, a law revision cannot change the effect of the law but has effect as if made by amendment.¹⁴ Now that the way those powers are used is to complement the system of consolidation, law revision can happen at any time, though at the moment there are two meetings of the Board each year at which proposed changes that cannot be made editorially are put to the Board.

¹³ Legislation Law, schedule 3, para 1(g). The repeal took place on the date of commencement of the Legislation Law.

¹⁴ Legislation Law at art 15(8).

The first meeting of the Board under the new arrangements was in 2023 and started with a long series of revisions nevertheless modest in their effect, namely some 259 changes across 115 enactments to reflect the change of monarch. So “Her Majesty” was changed to “His Majesty” and other references to “Queen” in both English and French were similarly updated. Other amendments provided for consistent use of “flammable” rather than a mixture of “flammable” and “inflammable”. A subsequent meeting updated references to repealed legislation, a ministerial office and changed some headings. It is hoped that time may be freed up in the Legislative Drafting Office to allow for the Law Revision Board’s work to be of greater impact, perhaps by re-writing the text of older laws so they more accurately reflect current drafting practice. Freed from the more mundane but onerous task of approving consolidated text, the Board’s work is potentially of much greater impact in improving the statute book.

Future plans

The next stage is probably to refine existing powers in the Legislation Law to enable more to be done editorially, for example, revisions to reflect changes that have taken place in titles, functions, etc., moving to gender-silent language, changing or relocating conjunctives and disjunctives and correcting what are obvious errors. These changes would free up the Law Revision Board for more significant tasks as mentioned above.

Another tool in the armoury of statute improvement is the so far unused power to make Statute Law Revision Regulations. Article 18 of the Legislation Law enables the States to use additional powers to make amendments to clarify ambiguity or reconcile inconsistencies in legislation, but it might be advantageous to enable the Regulations to correct textual errors. Also, it is hoped that it might be possible to add powers to the Legislation Law for Regulations to repeal or amend spent, redundant or obsolete legislation of the UK that has been extended to Jersey and extend other powers in the Legislation Law beyond Jersey legislation to cover UK extended legislation.

Finally, one change that was introduced on December 10, 2024 is “point in time” on the jerseylaw.je website. This function enables the website to display not just Jersey legislation as it is in force on the day it is viewed, but on a chosen day in the past, going back to the beginning of 2019. This will enable viewing of the law at the date an offence was committed, or a contract was formed, for a particular tax year, or to view the level of benefits applying at a particular date. Moving forward, the function will cover an increasing range of dates and will avoid the need to backtrack to find the law at a given date in the past.

Conclusion

Article 20 of the Legislation Law imposes a number of duties on the Principal Legislative Drafter in relation to drafting, consolidating and publishing legislation. There is also a duty:

to take any steps that the Principal Legislative Drafter considers appropriate to promote access to Jersey legislation, including ensuring that it is clearly and logically organised,

easy to understand, certain in its effect and as far as practicable conforms with current drafting practice.¹⁵

The Legislative Drafting Office strives to do all this, using the various powers in the Legislation Law, and is resourced to do so using its in-house editorial team. Keeping the statute book up to date is vital for a jurisdiction like Jersey to play its part on the world stage, but law revision enables us to go further by giving powers to correct and rewrite parts of the statute book. This can happen independently of the continuous consolidation and these two activities should be seen as complementary rather than alternatives. The current way of operating has, it is submitted, restored Jersey to its former position as a leading jurisdiction when it comes to the maintenance and improvement of its collection of legislation.

¹⁵ Legislation Law at art. 20(h).

Rules as Code vs. ChatGPT: Lessons from Converting Canadian Federal Legislation into Code using Blawx

Martin Perron and Anna Logie¹



Abstract

This article examines the process of experimentally converting the Canadian Navigable Waters Act definition of “navigable water” into code using an open-source Rules as Code tool called Blawx. The process highlighted the complexity of statutory interpretation and the importance of including legal experts in the process of encoding a legislative provision. Comparing the Blawx (symbolic AI) output to the ChatGPT (generative AI) output illustrated the differences between logic-based systems like Blawx and neural network-based systems like ChatGPT: the Blawx output was accurate and explainable, while the ChatGPT output contained significant errors. Also, while Blawx is a transparent tool, with the underlying s(CASP) code made available to users via the API, ChatGPT is a non-transparent (“black box”) tool, meaning that it is not possible to trace how the conclusions are generated. A hybrid approach that combined the Blawx logic-driven encodings with ChatGPT illustrated the potential benefits of hybrid (“neuro-symbolic”) AI, generating output that was plain language (due to ChatGPT) yet maintained Blawx’s level of accuracy,

¹ Martin Perron, Rules as Code lawyer/developer, Public Sector Experimentation, Canada School of Public Service (CSPS) and Anna Logie, Legislative Counsel, Legislation Section, Legislative Services Branch, Department of Justice Canada. The article is written and published in an individual capacity. The views expressed are those of the authors alone and not the views of their employers. The authors would like to thank all those who reviewed this piece for their helpful and insightful comments, and in particular Jason Annable, Marek Bilinski, Christina Bondi, Aleksander Hynnä, Sandra Markman, Jason Morris, Joshua Turner, and Matthew Waddington. For a video presentation based on this article, see Martin Perron, “Canadian legislation in Blawx vs ChatGPT”, Rules as Code Guild Presentation Townhall (September 2024): <https://www.youtube.com/watch?v=Ogw9uAx1jEA> (accessed September 27, 2024). For any feedback on the encodings in this article, please reach out to Martin Perron at martin.perron@cspc-efpc.gc.ca.

explainability and transparency. As legislative counsel explore potential uses for AI, they should consider whether the AI tool selected can meet the desired level of accuracy, explainability and transparency. In the case of digitizing rules in an accurate, explainable and transparent way, the authors consider that a Rules as Code or neuro-symbolic AI approach holds more potential than an approach focused solely on generative AI.

Introduction

“Rules as Code”, in the legislative context, is the process of taking legislative rules and turning them into a language that computers can read and understand (code). If the encodings are validated by rule makers to make sure they properly reflect the legal meaning, they can be used to power legal automation, simulation, and verification tools that support legislative drafting and that enhance public service delivery.² This article examines the process of experimentally converting an existing Canadian federal legislative provision into code using an open-source Rules as Code (RaC) tool called Blawx.³ For this encoding exercise, we selected the definition of “navigable water” (and related rules) in the *Canadian Navigable Waters Act* (CNWA),⁴ a law that provides protections for navigation on navigable waters in Canada. We chose to encode this definition as the content and language appear simple, but the process of encoding the rules revealed hidden complexity.

Part 1 of the article describes the process of encoding the legislative definition into Blawx. Part 2 explores the differences in the accuracy, explainability and transparency of the output of Blawx (which is a form of symbolic AI)⁵ versus that of ChatGPT (which is a form of generative AI).⁶ Part 3 assesses the level of accuracy, explainability and transparency of the output of a hybrid Blawx-ChatGPT (“neuro-symbolic AI”) approach. In the article, the term “explainability” focuses on whether the AI output is understandable, with clear, step-by-step logic-based reasons for specific outcomes, whereas “transparency” focuses on whether the AI system's underlying processes are traceable (known in the programming world as a

² Rules as Code can be used to programmatically test legislative text and the underlying policy to 1) find unintended gaps and ambiguities in the text, 2) facilitate subsequent development of service delivery-related IT tools (e.g. chatbots), and 3) facilitate compliance monitoring and auditing. For background on Rules as Code, see “Cracking the Code: Rulemaking for humans and machines”, OECD Observatory of Public Sector Innovation (2020): <https://oecd-opsi.org/publications/cracking-the-code/> (accessed September 27, 2024); Matthew Waddington, “Machine-consumable legislation: A legislative drafter’s perspective – human v artificial intelligence” (2019) 2 *The Loophole — Journal of the Commonwealth Association of Legislative Counsel* <https://www.calc.ngo/sites/default/files/loophole/Loophole%20-%202019-02%20%282019-06-24%29.pdf> (accessed September 27, 2024).

³ GitHub, “Blawx: A user-friendly web-based tool for Rules as Code”: <https://github.com/Lexpedite/blawx> (accessed September 27, 2024). Instructions on how to download Blawx locally can be found at the GitHub link.

⁴ R.S.C., 1985, c. N-22: <https://laws.justice.gc.ca/eng/acts/N-22/index.html> (accessed September 27, 2024).

⁵ Symbolic AI refers to an AI system that works by representing knowledge problems using symbols and efficiently searching the provided knowledge for new information through a series of logical inferences. Marta Garnelo and Murray Shanahan, “Reconciling deep learning with symbolic artificial intelligence: representing objects and relations” (October 2019): <https://www.sciencedirect.com/science/article/pii/S2352154618301943?via%3Dihub> (accessed September 29, 2024).

⁶ Generative AI refers to a type of artificial intelligence that can create new content, such as text, images, audio, or video, by learning patterns and structures from existing data. Inaccurate generative AI content is sometimes referred to as a “hallucination”. IBM, “What is generative AI?” (April 2023): <https://research.ibm.com/blog/what-is-generative-AI> (accessed September 29, 2024).

“white box” or “clear box”) or non-traceable (known in the programming world as a “black box”).

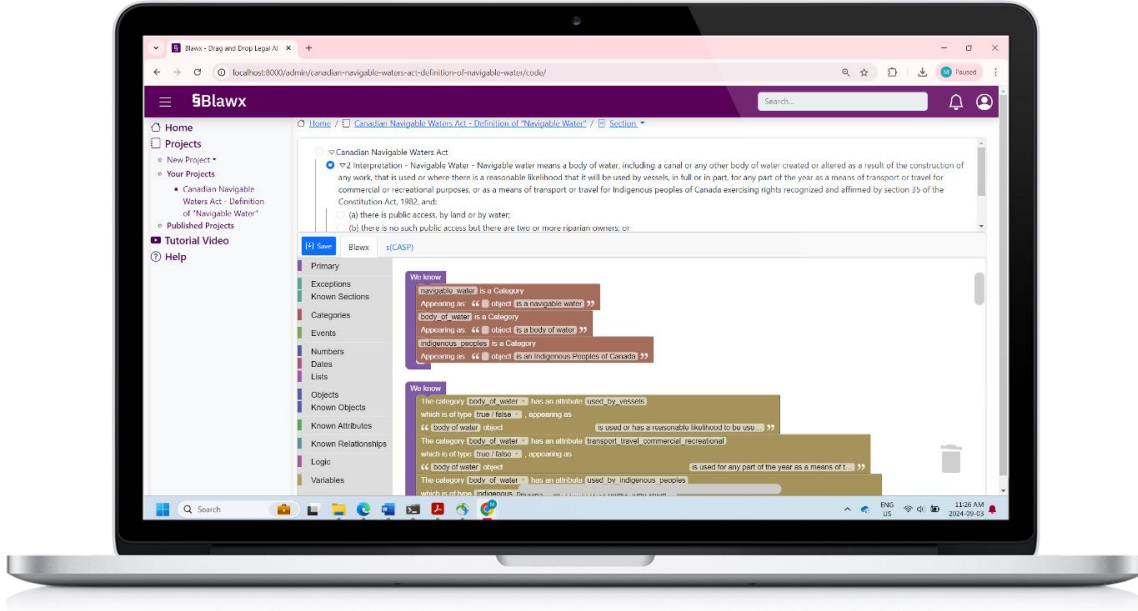
Blawx was selected for this Rules as Code exercise because it is an open-source and user-friendly programming tool designed specifically to help non-programmers encode, test, and use rules. It is powered by a predicate declarative logic programming language called s(CASP) which, in our view, is the optimal programming language for encoding complex legislation. The s(CASP) code is overlaid with a visual programming interface (Blockly) that enables rules to be coded in a drag-and-drop manner that prevents users from placing items in the wrong slots. In addition to offering a user-friendly interface, Blawx can execute hypothetical reasoning tasks and produces natural language answers and the logical explanations on which those answers are based. The combination of these features allows legislative counsel without programming experience to read, write, and analyze encoded legislative provisions in an accessible way.

As a prototype, Blawx is at the stage where it is being used experimentally for drafting and evaluation exercises. A lawyer/developer at the Canada School of Public Service (Martin) wrote the code using Blawx and then validated his modelling decisions with a legislative counsel (Anna) from the Department of Justice Canada’s AI/Rules as Code Working Group. We produced successive versions of the code, taking into account feedback from legislative counsel, lawyers, and subject matter experts, and feedback from Jason Morris, the legal computational expert who built Blawx. Please note that 1) the interpretation of the statutory provisions set out in this article is not an official interpretation of the law but rather our interpretation as individuals conducting Rules as Code experiments,⁷ and 2) Rules as Code encodings are best understood as a supplementary, digitized version of the rules (akin to guidance), to be read alongside the official legislative rules.

By walking you through our code, modelling decisions, tests, and some initial experiments comparing Rules as Code to Large Language Models (LLMs), we hope to convey three considerations when digitizing legislation:

1. encoding legislative rules involves an important element of statutory interpretation, which has implications for the type of coding tool to use;
2. when it comes to digitizing rules in a way that is accurate, explainable, and transparent, Rules as Code has an advantage over generative AI; and
3. combining Rules as Code with generative AI may provide a path to making the digitization of rules trustworthy, practical, and scalable.

⁷ We are lawyers using code on an experimental basis as a means of communicating legal knowledge. Also, neither of us were involved in drafting the legislative provisions mentioned in this article.



Blawx interface depicting the CNWA definition of “navigable water” and our related code

Part 1 – Converting the Legislative Definition of “Navigable Water” into Code

In this part, we will describe 1) the text of the legislative definition, 2) the modelling decisions we made to convert the CNWA definition of “navigable water” and related rules into code using Blawx, and 3) the lessons highlighted by the experiment, particularly in relation to the role of statutory interpretation in the encoding process.⁸

⁸ These modelling notes were written to explain the end state of the code. However, they do not convey the numerous modelling considerations and iterations that were made along the way. To better understand what writing laws into code *feels* like, see Jason Morris, “Rules as Code Demonstration: Encoding the Privacy Act in Blawx” (October 2023): https://github.com/PHACDataHub/privacy_rac_demo (accessed September 27, 2024).

Note: Encoding legislative rules does not have to be an all-or-nothing endeavor. Not all of the provisions of a given ruleset must be encoded for it to be useful, nor must all of the provisions be written with the same degree of specificity. For example, if a legislative rule contains a subjective element (e.g. something must be the case “in the opinion of” an official) or uses flexible terminology (e.g. something must be done within a “reasonable” time), the rule should be encoded in a way that carves out those components so as to not over-prescribe the answer. If a rule has received differing interpretations, it is also possible to encode the rule accordingly, by creating different sets of code corresponding to the differing interpretations of the rule. The best approach for modelling encoded legislation can be viewed as a function of the descriptiveness of the provision and the frequency by which it is referenced (i.e. rules that use descriptive language and are frequently cited are more suitable for a high-resolution encoding; rules that use less descriptive language and are less frequently cited may only merit a low-resolution encoding).

Legislative Definition of “Navigable Water”

The definition of “navigable water” is set out in section 2 of the CNWA (see below). It is presented in both English and French, as both language versions of a Canadian federal statute are official and authoritative expressions of the law.⁹ They must be read in light of each other and in light of applicable common law and civil law. In the Canadian Rules as Code context, this means that the encoding process should involve considering both language versions and legal systems and the encoding should be consistent with the context of the provision. Accordingly, while encoding the definition of “navigable water”, both language versions and legal systems were considered.¹⁰

Definitions

2 The following definitions apply in this Act.

[...]

Définitions

2 Les définitions qui suivent s’appliquent à la présente loi.

[...]

⁹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, subsection 18(1): <https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-42> (accessed November 25, 2024).

¹⁰ While the Blawx interface is currently in English, it would be possible to add a French interface in a future iteration.

navigable water means a body of water, including a canal or any other body of water created or altered as a result of the construction of any work, that is used or where there is a reasonable likelihood that it will be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes, or as a means of transport or travel for Indigenous peoples of Canada exercising rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and

- (a) there is public access, by land or by water;
- (b) there is no such public access but there are two or more riparian owners; or
- (c) Her Majesty in right of Canada or a province is the only riparian owner. (*eaux navigables*)

eaux navigables Plans d'eau, y compris les canaux et les autres plans d'eau créés ou modifiés par suite de la construction d'un ouvrage, qui sont utilisés ou vraisemblablement susceptibles d'être utilisés, intégralement ou partiellement, par des bâtiments, pendant tout ou partie de l'année comme moyen de transport ou de déplacement à des fins commerciales ou récréatives ou comme moyen de transport ou de déplacement des peuples autochtones du Canada exerçant des droits reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982* et qui, selon le cas :

- a) sont accessibles au public par voie terrestre ou maritime;
- b) sont inaccessibles au public et ont plus d'un propriétaire riverain;
- c) ont pour seul propriétaire riverain Sa Majesté du chef du Canada ou d'une province. (*navigable water*)

Encoding the Opening Passage of the Definition

Step 1: Breaking down the legal logic

After reading the English and French versions of the opening passage of the definition (also known as the “chapeau”), we identified two overarching scenarios in which a body of water could be a “navigable water” under the Act (see below).

Scenario 1 (body of water used for commercial or recreational purposes)	Scenario 2 (body of water used by Indigenous peoples)
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When we know all of the following...

- There is a body of water that could be artificial or naturally occurring (open definition).
- At least part of that body of water is used or has a reasonable likelihood to be used by vessels, for at least some part of the year, as a means of transport or travel for a commercial or recreational purpose.
- The body of water meets one or more of the criteria listed in paragraphs (a) to (c).

We also know that...

The body of water is “navigable water” according to section 2 of the CNWA.

When we know all of the following...

- There is a body of water that could be artificial or naturally occurring (open definition).
- At least part of that body of water is used or has a reasonable likelihood to be used by vessels, for at least some part of the year, as a means of transport or travel for Indigenous peoples of Canada exercising their section 35 constitutional rights.
- The body of water meets one or more of the criteria listed in paragraphs (a) to (c).

We also know that...

The body of water is “navigable water” according to section 2 of the CNWA.

Step 2: Defining the legal ontology

Creating categories

After analyzing the logic, we started building the code in Blawx. We first defined the legal ontology, which is the process of representing legal concepts and relationships in a structured manner for the computer to reason with (e.g. the key actors, groups, and concepts, and their relationships with one another). In Blawx, this is done through the creation of categories and attributes for the legal concepts that will later be assembled into a rule. We decided on three categories: one for navigable water (*navigable_water*), one for bodies of water (*body_of_water*), and one for Indigenous peoples of Canada (*indigenous_peoples*). A category can be viewed as a group in which one or many “objects” (a coding term) could belong. For example, “Ottawa River” is an “object” that falls under the category of *body_of_water* and a specific Indigenous people (e.g. the Anishinaabe Algonquin Nation) would fall under the category of *indigenous_peoples*.

```

We know
navigable_water is a Category
Appearing as: “ object is a navigable water ”
body_of_water is a Category
Appearing as: “ object is a body of water ”
indigenous_peoples is a Category
Appearing as: “ object is an Indigenous Peoples of Canada ”
    
```

Assigning attributes to objects

After building our categories, we assigned them attributes. An attribute could be a relationship between an object and a data value. For example, it may be true/false (data value) that the Ottawa River (object under the category *body_of_water*) is used, or has a reasonable likelihood to be used, by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes. An attribute can also be a relationship between two objects. For example, the Ottawa River (object under the category *body_of_water*) could be used, or have a reasonable likelihood to be used, by vessels as a means of transport or travel for the Anishinaabe Algonquin People (under the category *indigenous_peoples*) exercising their section 35 constitutional rights.¹¹ We have written three different attributes for this section of the code.

```

We know
The category body_of_water has an attribute used_by_vessels
which is of type true / false , appearing as
“ body of water object is used or has a reasonable likelihood to be use... ”
The category body_of_water has an attribute used_in_accordance_with_s35
which is of type indigenous_peoples , appearing as object, then value
“ body of water object is used or has a reasonable likelihood to be use... value exercising their section 35 constitutional rights ”
The category body_of_water has an attribute nav_water_definition_criteria
which is of type true / false , appearing as
“ body of water object meets navigable water definition paragraph crite... ”
    
```

Step 3: Encoding the rule for Scenarios 1 and 2

After defining the legal ontology, we started encoding the rule. We wanted to determine whether an object in the category *body_of_water* was also an object in the category *navigable_water*. In other words, we wanted to determine which bodies of water would qualify as “navigable water”. As discussed earlier, the CNWA sets out two scenarios in which a body of water can be a “navigable water”.

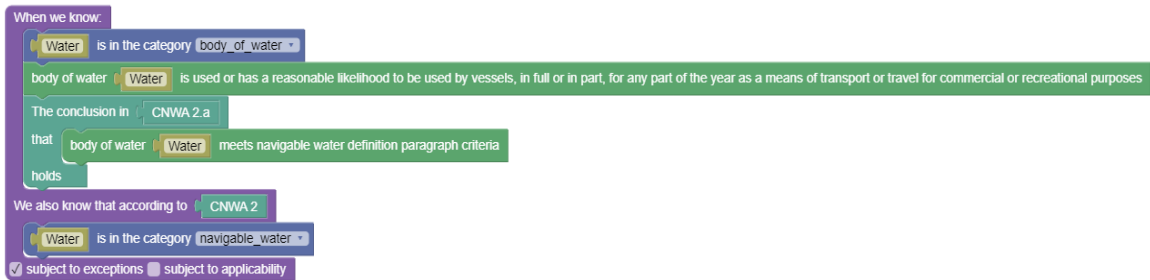
¹¹ Section 35 of the Canada’s *Constitution Act, 1982* explicitly recognizes and affirms the existing aboriginal and treaty rights of the First Nations, Métis, and Inuit peoples of Canada. These rights can include, for example, fishing rights.

Scenario 1 (body of water used for commercial or recreational purposes)

To encode Scenario 1, we first created a variable called *Water*, which was used as a placeholder for any object that falls under the category *body_of_water*. We then assembled the attributes to indicate the required combination of conditions that would trigger the application of the rule. At the bottom of the “When we know” portion of the rule, we first indicated that for the conclusion in the opening passage to be true, the conclusion in paragraph (a) of the definition had to be true as well. We then made two near-identical versions of this code for paragraphs (b) and (c).

We also checked the “subject to exceptions” box at the bottom of the purple blocks. This decision was made after encoding section 2.01 of the Act, a section which excludes certain bodies of water from the definition of “navigable water”. By checking the exceptions box, we were asking the Blawx reasoner to verify whether this part of the rule was overruled by another part of the same rule. We discuss this exception further at “Encoding Section 2.01 (“For greater certainty”)”.

Below is the code for Scenario 1:

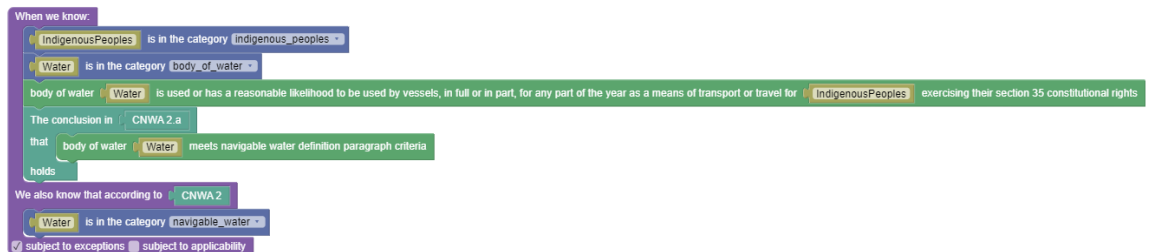


Note: Blawx does not yet have more advanced reference functionalities for definition sections. In a future iteration, the teal block labelled “CNWA 2.a” could appear as “CNWA 2 – definition of “navigable water” (a)”.

Scenario 2 (body of water used by Indigenous peoples)

We repeated a similar process to encode the rule for Scenario 2.

Below is the code for Scenario 2:



Note: The two encodings above are low-resolution interpretations of the opening passage of the “navigable water” definition. However, the logic can be broken down and represented in a number of different ways, depending on the desired degree of detail. Below is an experimental example of an alternative Scenario 2 encoding that introduces symbolic representations of definitions and key ontological concepts within the Act (e.g. “vessels”, “persons”, and “Indigenous peoples”). This design is more complicated and is of a higher resolution, but it could better explain how these concepts relate to one another within the Act.

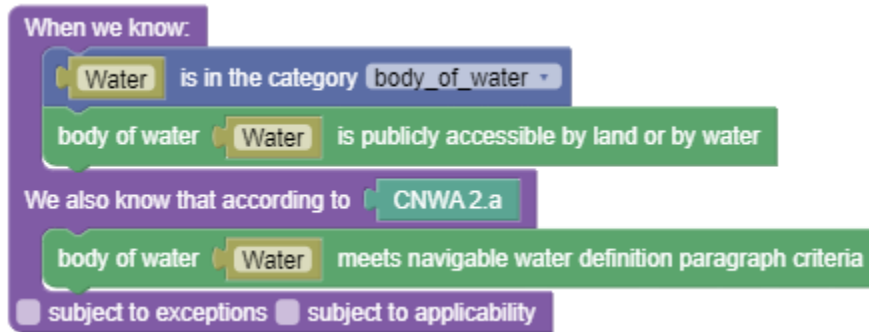
```

When we know:
  Water is in the category body_of_water
  Person is in the category person
  Vessel is in the category vessel
  IndigenousPeoples is in the category indigenous_peoples
  body of water Water is used or has a reasonable likelihood to be used by Person with vessel Vessel for any part of the year as a means of transport or travel
  person Person is a member of Indigenous peoples IndigenousPeoples and exercising rights in accordance with section 35 of the Constitution Act 1982
  The conclusion in CNWA 2.a
  that body of water Water meets navigable water definition paragraph criteria
  holds
  We also know that according to CNWA 2
  Water is in the category navigable_water
 subject to exceptions  subject to applicability
  
```

Encoding Paragraph (a) of the Definition

Having encoded the opening passage of the definition, the next step was to encode paragraphs (a), (b), and (c). The condition in paragraph (a) is that “there is public access, by land or by water”/“sont accessibles au public par voie terrestre ou maritime”. To encode paragraph (a), we first created a new attribute for *body_of_water* (“publicly accessible by land or by water”). Then, we indicated that, when a body of water is publicly accessible by land or by water, it triggers paragraph (a) of the “navigable water” definition and therefore meets one of the criteria in paragraphs (a) to (c) of the definition.

Below is the code for paragraph (a):



Encoding Paragraph (b) of the Definition

The condition in paragraph (b) of the definition is that “there is no such public access but there are two or more riparian owners”/“sont inaccessibles au public et ont plus d’un propriétaire riverain”. Encoding paragraph (b) was slightly more complex than encoding paragraph (a), as it is interwoven with facts that are nested in both paragraphs (a) and (c). We started by creating a new true/false attribute for *body_of_water* to identify instances where the body of water might have two or more riparian owners.

While reading paragraphs (b) and (c) side by side, we also noticed that both paragraphs cannot be true at the same time. In other words, a body of water cannot simultaneously have His Majesty in right of Canada or a province as the only riparian owner and have two or more riparian owners. We therefore created a true/false attribute for *body_of_water* to identify instances where His Majesty in right of Canada or a province is the sole owner of a body of water. We also changed “Her Majesty” to “His Majesty” in the code, as we now have a King, and subsection 35(1) of the *Interpretation Act* indicates that these terms are interchangeable.¹² Subsection 35(1) also states that a “province” includes a “territory”.¹³ Accordingly, to facilitate comprehension for the reader, we decided to refer to both a “province” and a “territory” in the code.

We used the “*it is false that*” block for “*body of water X is publicly accessible by land or by water*” because the text explicitly says that this information must be discovered in order to generate a conclusion. We used the “*there is no evidence that*” block for “*body of water X has His Majesty in right of Canada or a province or a territory as the only riparian owner*” because 1) if it is true that there is two or more riparian owners, by definition, it cannot be true that there is one riparian owner, and 2) paragraph (b) does not explicitly require this condition to be known in order to generate a conclusion.

¹² However, we did not change “Her Majesty” to “His Majesty” in the natural (legislative) language that is copy-pasted into Blawx as we were not altering the law itself.

¹³ R.S.C., 1985, c. I-21: <https://laws.justice.gc.ca/eng/acts/i-21/index.html> (accessed November 26, 2024). In a future iteration of Blawx, encoded versions of key drafting rulesets like the *Interpretation Act* could be linked to encoded sets of federal legislation so that such clarifications could be provided automatically.

Note: An important distinction needs to be made between the “*it is false that*” and the “*there is no evidence that*” blocks. “*It is false that*” should be used in instances where a conclusion requires knowledge that something not be true (i.e. it is known to be false), while “*there is no evidence that*” should be used in instances where a conclusion can be generated as long as something is *not* known to be true (i.e. it is either known to be false, or there is not sufficient evidence that it is true). This distinction, while admittedly confusing, has important logical implications. It is akin to finding an accused “guilty” (e.g. evidence the accused committed an offence) or “not guilty” (e.g. no evidence the accused committed an offence) rather than finding them “innocent” (e.g. evidence the accused did not commit an offence) or “not innocent” (e.g. no evidence the accused did not commit an offence).

Below is the code for paragraph (b):

```
When we know:
  Water is in the category body_of_water
  it is false that
    body_of_water Water is publicly accessible by land or by water
  body_of_water Water has two or more riparian owners
  there is no evidence that
    body_of_water Water has His Majesty in right of Canada or a province or a territory as the only riparian owner
We also know that according to CNWA 2.b
  body_of_water Water meets navigable water definition paragraph criteria
subject to exceptions subject to applicability
```

We also expressed some of our modelling decisions using the internal commentary tool that Blawx has, as shown below:

```
there is no evidence that
  body_of_water Water has His Majesty in right of Canada or a province or a territory as the only riparian owner
```

We changed “Her Majesty” to “His Majesty” in the code, as we now have a King, and subsection 35(1) of the Interpretation Act indicates that these terms are interchangeable . Subsection 35(1) of the Interpretation Act also states that a “province” includes a “territory”. Accordingly, to facilitate comprehension for the reader, we decided to refer to both a “province” and a “territory” in the code.

Encoding Paragraph (c) of the Definition

The condition in paragraph (c) of the definition is that “Her Majesty in right of Canada or a province is the only riparian owner”/“ont pour seul propriétaire riverain Sa Majesté du chef du Canada ou d’une province”. The logic of paragraph (c) is similar to the logic of paragraph (b), but it is less complicated. The ontology had already been created for paragraph (c) so all we needed to do was to assemble the rule using a similar logic structure to that shown in paragraph (b).

Below is the code for paragraph (c):

```

When we know:
  Water is in the category body_of_water
  body of water Water has His Majesty in right of Canada or a province or a territory as the only riparian owner
  there is no evidence that
  body of water Water has two or more riparian owners

We also know that according to CNWA 2.c
  body of water Water meets navigable water definition paragraph criteria
  subject to exceptions subject to applicability
    
```

Encoding Section 2.01 (“For greater certainty”)

The “navigable water” definition is also impacted by section 2.01 of the Act, so we encoded that rule as well. Section 2.01 of the CNWA reads as follows:

For greater certainty — <i>navigable water</i>	Précision — <i>eaux navigables</i>
<p>2.01 For greater certainty, the definition <i>navigable water</i> in section 2 does not include artificial irrigation channels or drainage ditches.</p>	<p>2.01 Il est entendu que sont exclus de la définition de <i>eaux navigables</i>, à l’article 2, les canaux d’irrigation et les tranchées de drainage artificiels.</p>

Step 1: Breaking down the legal logic

Section 2.01 is framed as a “for greater certainty” clause that relates to “artificial irrigation channels or drainage ditches”/“les canaux d’irrigation et les tranchées de drainage artificiels”. “For greater certainty” clauses imply that, even without the existence of the clause, the same legal conclusion would still hold.¹⁴ As per Canadian federal drafting conventions, they are generally used to affirm a statement by providing an example that

¹⁴ P. Salembier, *Legal and Legislative Drafting* (LexisNexis Canada, 2009) at p 364.

restates the existing content in a way that is clearer. However, in this case, it appears that the rule makers may have wanted to alter the nature of the definition by excluding certain types of bodies of water (“artificial irrigation channels or drainage ditches”) from being categorized as “navigable water”. In other words, in terms of the legal logic behind section 2.01, it arguably appears to be a substantive rule (an exception) rather than a “for greater certainty” clause.¹⁵

Step 2: Encoding the rule

Having decided that the rule in section 2.01 could be understood as an exception to the section 2 definition of “navigable water”, we then encoded the rule. To do so, we created a true/false attribute for *body_of_water* to identify bodies of water that are “artificial irrigation channels or drainage ditches” under section 2.01 of the CNWA, and then built a rule to indicate that these bodies of water did not fall under the definition of “navigable water”.

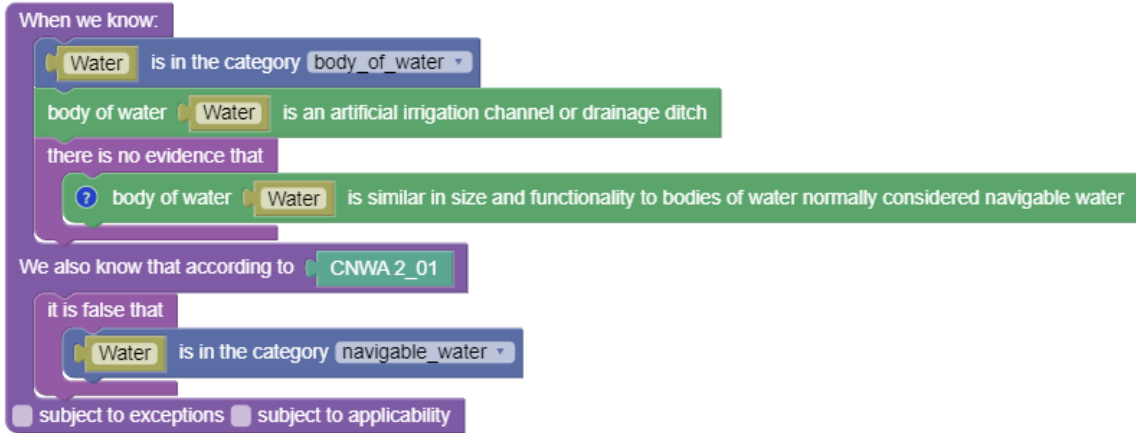
When we reviewed our initial encodings with another legislative counsel who had subject matter expertise with the contents of this Act, it was brought to our attention that 1) there are artificial irrigation channels that are qualitatively similar (e.g. in size and functionality) to bodies of water that are more commonly considered navigable waters, and 2) those types of artificial irrigation channels could be interpreted to be navigable water under the modern rule of statutory interpretation.¹⁶ In response to this, we modified our code to limit the assertion of our exception to instances where such bodies of water did not share similar qualitative properties with known navigable water bodies.

Note: The section 2.01 “for greater certainty” clause is a great example of a rule that cannot be understood by reading the grammatical sense of the words of their own. Without access to specialized legislative expertise, it is highly unlikely that someone encoding this rule would be able to accurately interpret these types of clauses. It is also important to note that, while our interpretation is likely correct, further investigation into this provision could lead us to interpret and encode it differently.

Below is the code for section 2.01:

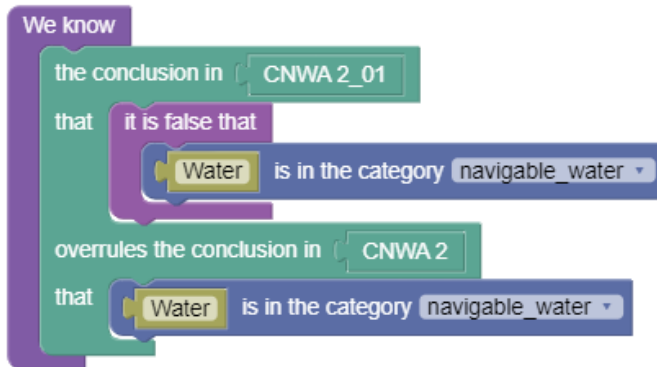
¹⁵ Section 2.01 was not part of the initial version of the bill which updated the CNWA definition of “navigable water” but was rather added to the bill at the parliamentary committee stage.

¹⁶ Statutes are to be read “[...] in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21. See also “Navigability Assessment Questions and Answers”, Transport Canada: <https://npp-submissions-demands-ppn.tc.canada.ca/content/doc/Navigability%20Assessment%20%E2%80%93%20Questions%20and%20Answers.pdf> (accessed September 27, 2024).



In order to link this rule to the code of the opening passage, we encoded an “override statement”, which indicates that a conclusion that 2.01 applies will “override” a conclusion that a body of water is “navigable water” under section 2.

Below is the “override statement” for section 2.01:



Encoding Paragraph 28(1)(g.1) (Regulatory Carve-Out)

Another rule that impacts the definition of “navigable water” is paragraph 28(1)(g.1) of the CNWA. This paragraph authorizes the Governor in Council to make regulations excluding any body of water from the definition of “navigable water”. Paragraph 28(1)(g.1) reads as follows:

Regulations by Governor in Council	Règlements du gouverneur en conseil
<p>28 (1) The Governor in Council may, for the purposes of this Act, make regulations [...]</p> <p>(g.1) excluding any body of water that the Governor in Council considers to be small from the definition <i>navigable water</i> in section 2;</p>	<p>28 (1) Le gouverneur en conseil peut, pour l'application de la présente loi, prendre des règlements : [...]</p> <p>g.1) excluant des plans d'eau qu'il estime être petits de la définition de <i>eaux navigables</i> à l'article 2;</p>

The logic of this rule is very similar to the logic for section 2.01; as with section 2.01, if paragraph 28(1)(g.1) applies (or, more specifically, a regulation made under it), then the conclusion is that the body of water is not a “navigable water”, and that conclusion will “overrule” a conclusion that a body of water is “navigable water” under section 2.

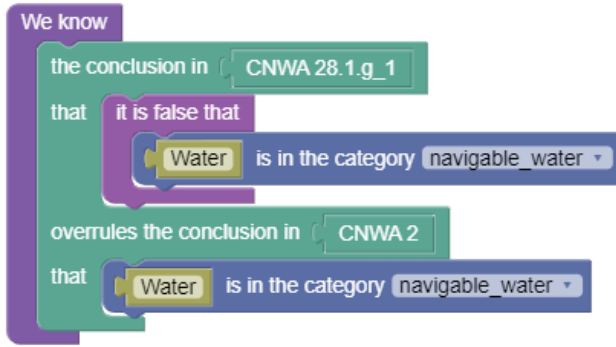
Below is the code for paragraph 28(1)(g.1):

```

When we know:
  Water is in the category body_of_water
  the Governor in Council has excluded body of water Water from the s.2 definition of navigable water via regulation
We also know that according to CNWA 28.1.g_1
  it is false that
    Water is in the category navigable_water
subject to exceptions subject to applicability
  
```

We then encoded an “overrule statement” to link the code for paragraph 28(1)(g.1) to the code of the opening passage. It indicates that a conclusion that paragraph 28(1)(g.1) applies (or, more specifically, that a regulation made under it applies) will “overrule” a conclusion that a body of water is “navigable water” under section 2.

Below is the “overrule statement” for paragraph 28(1)(g.1):



Lesson 1: Encoding legislative rules involves an important element of statutory interpretation, which has implications for the type of coding tool to use

The first lesson highlighted by this exercise – one that has implications for the use of AI in the legislative space – is that accurately converting legislative language into code is not a purely coding exercise that can be done by programmers alone, but rather a complex exercise that involves an important element of statutory interpretation. While the text of the definition of “navigable water” and related rules at section 2.01 and paragraph 28(1)(g.1) were relatively short (approximately half a page in total), the process of encoding the rules required a comprehensive interpretive process involving legal and legislative knowledge.

Notably, the encoding process involved interpreting both language versions (English and French) of the rules in light of both of Canada’s legal systems (common law and civil law), Canada’s modern rule of statutory interpretation, and the *Interpretation Act*. We suggest that it is unlikely that a person who was not a lawyer could accurately interpret and encode the definition of “navigable water” and related rules from reading the text on its own. While programmers can write rules into code, they lack the knowledge of statutory interpretation required to interpret legislative rules in all their complexity.

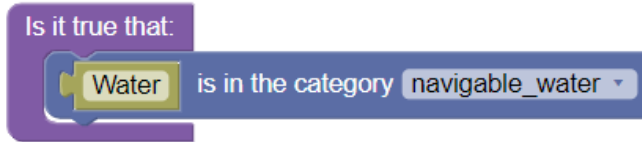
An advantage of the Rules as Code tool we selected for this experiment (Blawx) is that it has been designed to enable the coding to be done directly by the people best placed to do statutory interpretation (lawyers, including legislative counsel) – an element that is missing in many other Rules as Code tools that are geared towards programmers. Neither of us had significant training in programming tools prior to using Blawx, yet we were able to use Blawx to reflect in code our interpretation of the rule.

Part 2 – Testing the Blawx Encodings of “Navigable Water” versus ChatGPT’s Interpretation

In this part, we will demonstrate how we tested our Blawx code and assessed the quality of the output by comparing it to the output of ChatGPT 4o mini and ChatGPT 4o. To test the output of the Blawx encodings, we first encoded a test question in Blawx to determine whether an unidentified variable (*Water*) falls under the definition of “navigable water” (a yes/no question). Using this test question (or a modified version of it), we ran three tests on

the Blawx encodings: a test related to the Ottawa River, a test about an artificial irrigation channel, and a test to generate *Why* and *Why Not* explanations.¹⁷

Below is the code for the test question:



Blawx Encodings – Test 1: Ottawa River

For the first test, we chose a specific Canadian use case: the Ottawa River. In the Scenario Editor window of Blawx, we inputted all the relevant information we knew about the Ottawa River to help us determine the ways in which it could fall under the encoded definition of “navigable water”. For example, we inputted that vessels travel along the Ottawa River and that it is not an artificial irrigation channel or drainage ditch. We also inputted that the Ottawa River is used by the Anishinaabe Algonquin People exercising section 35 constitutional rights. We labelled some information “uncertain”, such as whether the Ottawa River has one or multiple riparian owners. This indicated to Blawx to consider whether the information must be true in order to generate a conclusion.

Note: If no information is provided for a specific category, the Blawx reasoner will not assume that this information is false. The absence of information will satisfy the “*there is no evidence that...*” block, but it will not satisfy the “*it is false that...*” block.

Below is the set of facts that we inputted into the Blawx reasoner for Test 1:

¹⁷ *Why* and *Why Not* tests are used to identify every hypothetical way in which a rule might (“why”) or might not (“why not”) apply, which can be useful for drafting (e.g. identifying edge cases or unintended outcomes).

Facts

- the_Ottawa_River is a body of water
- the_Anishinaabe_Algonquin_People is an Indigenous Peoples of Canada
- body of water the_Ottawa_River is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes
- body of water the_Ottawa_River is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for the_Anishinaabe_Algonquin_People exercising their section 35 constitutional rights
- body of water the_Ottawa_River is publicly accessible by land or by water
- it is uncertain whether body of water the_Ottawa_River has two or more riparian owners
- it is uncertain whether body of water the_Ottawa_River has His Majesty in right of Canada or a province or a territory as the only riparian owner
- it is false that body of water the_Ottawa_River is an artificial irrigation channel or drainage ditch
- it is uncertain whether the Governor in Council has excluded body of water the_Ottawa_River from the s.2 definition of navigable water via regulation

When we ran this set of facts through the encodings (by clicking the “Run” button in Blawx’s Scenario Editor), we received one answer from the Blawx reasoner (namely that the Ottawa River could be a “navigable water” based on the facts provided), with four different explanations. These explanations are based on combinations of Scenarios 1 and 2 of the opening passage and the criteria of paragraphs (a) and (c) of the “navigable water” definition. The test could not generate a conclusion as to whether the Ottawa River would meet the criteria of paragraph (b) because doing so would have required that there be no public access to the body of water.¹⁸

Below is how the Blawx output appears when the headings are collapsed. For reasons of brevity, we will only discuss in detail explanations #1 and #4.¹⁹

Answers	
Answer #1	^
Explanation #1	∨
Explanation #2	∨
Explanation #3	∨
Explanation #4	∨

Explanation #1 from Blawx indicated that the Ottawa River could be a “navigable water” under the CNWA because it falls under Scenario 1 of the opening passage (body of water

¹⁸ In other words, the fact that the Ottawa River is publicly accessible by land or by water (i.e. it is true that there is public access) triggered a component of the paragraph (a) criterion that cannot also trigger the paragraph (b) criterion (i.e. it is false that there is public access).

¹⁹ Explanations #2 and #3 are similar to explanations #1 and #4 (explanation #2 covers Scenario 2 and paragraph (a); explanation #3 covers Scenario 1 and paragraph (c)).

used for commercial or recreational purposes) and paragraph (a) (there is public access), and because there is no evidence that section 2.01 or paragraph 28(1)(g.1) applies.

Below is a set of key conclusions from explanation #1:

We know it holds that according to [section 2](#), the_Ottawa_River is a navigable water because

- according to [section 2](#), the_Ottawa_River is a navigable water^[7] and
- there is no evidence that the conclusion in [section 2](#) that the_Ottawa_River is a navigable water is defeated^[7].

We know according to [section 2](#), the_Ottawa_River is a navigable water because

- the_Ottawa_River is a body of water^[7]
- body of water the_Ottawa_River is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes^[7] and
- it holds that according to [section 2 paragraph a](#), body of water the_Ottawa_River meets navigable water definition paragraph criteria^[7].

There is no evidence that the conclusion in [section 2](#) that the_Ottawa_River is a navigable water is defeated because

- there is no evidence that it holds that it is false that according to [section 2.01](#), it is not true that the_Ottawa_River is a navigable water^[7] and
- there is no evidence that it holds that it is false that according to [section 28 subsection 1 paragraph g.1](#), it is not true that the_Ottawa_River is a navigable water^[7].

Explanation #4 hypothesizes a way in which the Ottawa River could be a “navigable water” through Scenario 2 of the opening passage (body of water used by Indigenous peoples) and paragraph (c) (His Majesty is the only riparian owner). This output was the result of our indicating that it was “uncertain” whether the Ottawa River has one or multiple riparian owners. The output also indicated that neither section 2.01 nor paragraph 28(1)(g.1) can apply for this conclusion to hold.

Below is a set of key conclusions from explanation #4:

We know it holds that according to [section 2](#), the_Ottawa_River is a navigable water because

- according to [section 2](#), the_Ottawa_River is a navigable water^[7] and
- there is no evidence that the conclusion in [section 2](#) that the_Ottawa_River is a navigable water is defeated^[7].

We know according to [section 2](#), the_Ottawa_River is a navigable water because

- the_Anishinaabe_Algonquin_People is an Indigenous Peoples of Canada^[7]
- the_Ottawa_River is a body of water^[7]
- body of water the_Ottawa_River is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for the_Anishinaabe_Algonquin_People exercising their section 35 constitutional rights^[7] and
- it holds that according to [section 2 paragraph c](#), body of water the_Ottawa_River meets navigable water definition paragraph criteria^[7].

There is no evidence that the conclusion in [section 2](#) that the_Ottawa_River is a navigable water is defeated because

- there is no evidence that it holds that it is false that according to [section 2.01](#), it is not true that the_Ottawa_River is a navigable water^[7] and
- there is no evidence that it holds that it is false that according to [section 28 subsection 1 paragraph g.1](#), it is not true that the_Ottawa_River is a navigable water^[7].

Note: When providing an explanation, Blawx differentiates conclusions based on known facts from ones that depend upon assumptions. It is important to highlight any assumptions identified in the explanations, such as the fulfillment of conditions, as the explanations hold only if the assumptions turn out to be correct (e.g. if all applicable conditions are met). Take, for example, the text below, which was displayed in all four of the Blawx explanations generated during our Ottawa River test.

There is no evidence that body of water ottawa_river is an artificial irrigation channel or drainage ditch.
It is assumed that there is no evidence that the Governor in Council has excluded body of water ottawa_river from the s.2 definition of navigable water via regulation.

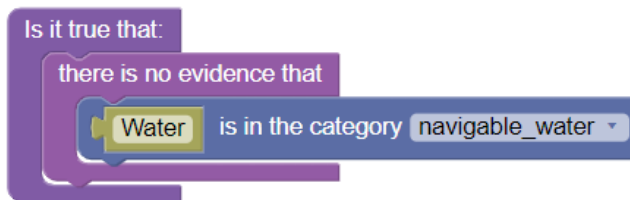
Since we explicitly indicated in our facts that the Ottawa River was not an artificial irrigation channel or drainage ditch, the first portion of the text (i.e. “there is no evidence”) provides a clear statement which indicates that this criteria has been met. However, since we told our code that we were “uncertain” as to whether the Governor in Council excluded the Ottawa River from the section 2 definition, the second portion of the text indicates that this criteria must be assumed in order for the explanation to hold.

The Blawx answer and explanations for Test 1 were accurate based on our input. We did not see any errors generated. In addition, because of the Blawx explanation functionality, all of the logical steps that led to the conclusion that the Ottawa River was a “navigable water” were also laid out for the user to read and validate.

Blawx Encodings – Test 2: Artificial Irrigation Channel

For the second test, we wanted to see how our code responded when section 2.01 applied. To do this, we reversed the formulation of our test question to see whether there was *no* evidence that a body of water was “navigable water”.

Below is the code for the test question:



We then created a body of water called “A” and kept our facts simple. Similar to explanation #1 from our Ottawa River test, we activated facts that would trigger Scenario 1 and paragraph (a). We also indicated that “A” was an artificial irrigation channel and that it was not similar in size or functionality to a body that is normally considered “navigable water”.

Below is the set of facts that we inputted into the Blawx reasoner for Test 2:

Facts

- A is a body of water
- body of water A is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes
- body of water A is publicly accessible by land or by water
- body of water A is an artificial irrigation channel or drainage ditch
- it is false that body of water A is similar in size and functionality to bodies of water normally considered navigable water

Running these facts generated one answer, namely that, despite “A” meeting the section 2 criteria through Scenario 1 and paragraph (a), “A” was not a “navigable water” because section 2.01 applied.

Below is a set of key conclusions from the explanation generated by Blawx:

There is no evidence that it holds that according to [section 2](#), A is a navigable water because

- according to [section 2](#), A is a navigable water^[1] and
- the conclusion in [section 2](#) that A is a navigable water is defeated^[1].

We know according to [section 2](#), A is a navigable water because

- A is a body of water^[1]
- body of water A is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes^[1] and
- it holds that according to [section 2 paragraph a](#), body of water A meets navigable water definition paragraph criteria^[1].

We know according to [section 2.01](#), it is not true that it is not true that A is a navigable water because

- A is a body of water^[1]
- body of water A is an artificial irrigation channel or drainage ditch^[1] and
- there is no evidence that body of water A is similar in size and functionality to bodies of water normally considered navigable water^[1].

As with Test 1, the Blawx answer and explanation for Test 2 were accurate, explainable and transparent. The outlined reasoning reliably and properly reflected our encoding of the rules, and the outputs clearly explained how a conclusion was rendered, given the facts provided.

Note: The Blawx explanation for section 2.01 incorrectly repeats the words “it is not true” in its reasoning. There are also instances where double negations are used in the explanations in a way that can be confusing for the reader. These are known bugs in the software that are fixable and that will be addressed in a future iteration of Blawx.

Blawx Encodings – Test 3: Why and Why Not Explanations

For our third test, we used *Why* and *Why Not* tests to identify all the ways in which a body of water could (or could not) be a “navigable water”. This type of test could be used, for example, if rule makers are hoping to amend the definition of “navigable water” and wish to understand the scope of the definition, including unanticipated scenarios resulting from the outlined logic.

First, we started by identifying all potential ways that a body of water can fall under the “navigable water” definition. We did this by reusing our test question from Test 1 (i.e. “Is it true that a body of water is in the category navigable water?”) and activating all of the selectable parameters with the “uncertain” label. Unlike the “true” and “false” statements used in previous tests, we use the “uncertain” label when we want the Blawx reasoner to consider whether the information must be known as true/false in order to make a specific conclusion. The Blawx reasoner identifies which of the facts are required by converting them into “known” statements in the explanations. For example, the input “*it is uncertain that body of water is publicly accessible by land*” becomes the output “*we know the body of water is publicly accessible by land*” in explanations that require it as a known fact.

Note: We also did not name our objects for this test. By saying “*It is uncertain whether any object is a body of water*” and “*It is uncertain whether any object is an Indigenous peoples of Canada*”, we are asking the Blawx reasoner to consider whether one or more of these statements are required in order to generate a conclusion. Some Blawx explanations may require both statements, but others may only need one.

Below is the set of facts that we inputted into the Blawx reasoner for Test 3:

Facts

- it is uncertain whether any object is a body of water
- it is uncertain whether any object is an Indigenous Peoples of Canada
- it is uncertain whether body of water any body_of_water is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes
- it is uncertain whether body of water any body_of_water is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for any indigenous_peoples exercising their section 35 constitutional rights
- it is uncertain whether body of water any body_of_water is publicly accessible by land or by water
- it is uncertain whether body of water any body_of_water has two or more riparian owners
- it is uncertain whether body of water any body_of_water has His Majesty in right of Canada or a province or a territory as the only riparian owner
- it is uncertain whether body of water any body_of_water is an artificial irrigation channel or drainage ditch
- it is uncertain whether body of water any body_of_water is similar in size and functionality to bodies of water normally considered navigable water
- it is uncertain whether the Governor in Council has excluded body of water any body_of_water from the s.2 definition of navigable water via regulation

Running these facts generated twelve answers, each with one explanation. For example, explanation #10 hypothesizes an instance where a body of water labelled “H21”²⁰ – an artificial irrigation channel with similar size and functionality to a navigable water – meets the definition requirements through Scenario 1 of the opening passage and paragraph (c).

Below is a set of key conclusions from explanation #10:

²⁰ When running a test in Blawx, the reasoner will label any hypothetical entities using a combination of letters and numbers.

We know according to [section 2](#), H21 is a navigable water because

- H21 is a body of water^[1]
- body of water H21 is used or has a reasonable likelihood to be used by vessels, in full or in part, for any part of the year as a means of transport or travel for commercial or recreational purposes^[1] and
- it holds that according to [section 2 paragraph c](#), body of water H21 meets navigable water definition paragraph criteria^[1].

There is no evidence that according to [section 2 01](#), it is not true that it is not true that H21 is a navigable water because

- H21 is a body of water^[1]
- body of water H21 is an artificial irrigation channel or drainage ditch^[1] and
- body of water H21 is similar in size and functionality to bodies of water normally considered navigable water^[1].

Next, we reversed our question (i.e. we used the Test 2 question – “Is it true that there is no evidence that a body of water is in the category of navigable water?”) and repeated the same steps. This produced sixteen answers in a similar format to the ones shown above. Both sets of answers and explanations could be reviewed by rule makers to assess the accuracy of the encodings.

As with Tests 1 and 2, the Blawx output for Test 3 was accurate and explainable. In addition, it automatically generated every way that a legal conclusion might and might not hold with a high degree of accuracy and explainability, making it the only user-friendly tool for non-programmer lawyers that we are aware of that can do this.²¹

ChatGPT 4o mini – Definition of “Navigable Water”

Having tested the quality of our Blawx encoding of the definition of “navigable water” and related rules, we then tested two ChatGPT chatbots to see which type of AI – symbolic AI (Blawx) or generative AI (ChatGPT) – generated the most accurate and explainable output. First, we tested the less expensive ChatGPT 4o mini. Then, to see if the quality of results improved with a more expensive version, we tested ChatGPT 4o. For the test of ChatGPT 4o mini, our questions focused on whether the Ottawa River could be a “navigable water” under the CNWA as well as whether an artificial irrigation channel could be a “navigable water”.

Below is our first question and ChatGPT 4o mini’s response:

²¹ For another example of writing rules into s(CASP) (the programming language used in Blawx) to answer *Why* and *Why Not* legal questions, see Jason Morris, “Constraint answer set programming as a tool to improve legislative drafting” (2021) Proceedings of the 18th International Conference on Artificial Intelligence and Law: <https://ink.library.smu.edu.sg/cclaw/7> (accessed September 27, 2024).

Is the Ottawa River considered "navigable water" according to the Canadian Navigable Waters Act? Please explain your reasoning and cite the specific sections of the law that you consulted when coming to your conclusion.



Yes, the Ottawa River is considered "navigable water" according to the Canadian Navigable Waters Act (NWA). Here's a detailed explanation based on the law:

Understanding Navigable Waters

The Canadian Navigable Waters Act is designed to ensure that navigable waters in Canada are protected, and it defines "navigable waters" broadly. According to the Act:

- Navigable waters are generally those where a vessel can be navigated, and this includes rivers, lakes, and other bodies of water that are used or capable of being used for navigation.

Key Sections of the Act

1. Definition of Navigable Waters:

- Section 2 of the NWA provides the definition: "navigable water" means any body of water, whether it is a lake, river, or other body of water, that is capable of being navigated by any type of vessel."

2. Regulation of Navigable Waters:

- Section 5 of the NWA outlines that the Minister has authority to assess and regulate any project or activity that might affect the navigation of a navigable water. This regulation applies to any body of water that qualifies as navigable.

Specific Application to the Ottawa River

The Ottawa River is a major river that has been historically and currently used for various types of navigation, including recreational boating and commercial activities. Given its usage and the definition provided in the Act, it clearly qualifies as navigable. The river has significant commercial and recreational importance, which further supports its status as navigable under the Act.

Therefore, based on the general definition of "navigable water" and the applicability of regulations under the NWA, the Ottawa River is indeed considered a navigable water. This means that any development or activity affecting its navigability would be subject to the provisions of the Canadian Navigable Waters Act.

While the answer that “the Ottawa River is indeed considered a navigable water” was correct, the explanations provided by ChatGPT 4o mini to support its answer contained numerous hallucinations as well as information that was not pertinent to the Act’s definition of “navigable water”. For example:

- The definition of “navigable water” provided by ChatGPT 4o mini was *not* the actual definition from the Act, despite being confidently displayed to the user as if quoted directly from its source.

- ChatGPT 4o mini did not mention or appear to consider the French version of the definition, which is equally authoritative.²²
- The reference to section 5 of the CNWA was irrelevant. Section 5 concerns work permit applications to be submitted to the Minister of Transport for projects on navigable waters and it is not relevant to the analysis of whether a body of water is a “navigable water”.
- The answer did not mention that the Ottawa River is used by Indigenous peoples exercising section 35 rights (relevant to Scenario 2 of the opening passage of the definition).
- The answer did not mention the section 2.01 “for greater certainty” clause nor paragraph 28(1)(g.1) in its reasoning, even though those provisions would need to be considered to determine if a body of water was “navigable water”.

Whereas the Blawx reasoner generated reliable output that directly communicated and cited our encoded legislation (see *Blawx Encodings – Test 1: Ottawa River* above), ChatGPT 4o mini’s response to a similar question about the Ottawa River generated significant errors and omissions.

We decided to give ChatGPT 4o mini a second chance to consider section 2.01 in its reasoning by asking whether an artificial irrigation channel could be a “navigable water” under the CNWA.

Below is our second question and ChatGPT 4o mini’s response:

²² ChatGPT does not appear to understand the characteristics of Canada’s legal system and structure. In hindsight, we should have asked ChatGPT to consider both the official French and English versions of the law prior to providing an answer. In a future experiment, it would be interesting to see how generative AI tools like ChatGPT deal with divergences, if any, in their language-dependent answers.

Let's do a different example. Assume we're talking about a body of water called X, and let's say X is an artificial irrigation channel. Would X also be navigable water according to the Canadian Navigable Waters Act?



The status of an artificial irrigation channel, such as the body of water X in your example, under the Canadian Navigable Waters Act (NWA) depends on several factors related to its navigability. Here's how the Act would apply:

Definition of Navigable Water

Under the Canadian Navigable Waters Act, a "navigable water" is defined as:

- Section 2: "navigable water" means any body of water, whether it is a lake, river, or other body of water, that is capable of being navigated by any type of vessel."

Determining Navigability

For a body of water to be considered navigable under the Act, it must be capable of supporting navigation by a vessel. This includes:

- Usage: The body of water must be used or capable of being used for navigation.
- Navigation Capability: The water must be suitable for the type of vessels intended to use it.

Application to an Artificial Irrigation Channel

1. **Type of Water Body:** An artificial irrigation channel is typically designed for the specific purpose of irrigation, not for navigation. The primary use of such channels is to direct water for agricultural purposes.
2. **Navigation:** For X to be considered navigable, it would need to be used for or capable of supporting navigation. If the irrigation channel is too narrow, shallow, or otherwise unsuitable for any type of vessel, it would not meet the definition of "navigable water."
3. **Regulatory Considerations:** If X were to be used for navigation or if there were projects that might affect its navigability, then it could be subject to regulations under the NWA. However, if it is purely an irrigation channel without any navigational use or capability, it would not be classified as navigable water under the Act.

Conclusion


In summary, an artificial irrigation channel like X would generally not be considered navigable water under the Canadian Navigable Waters Act unless it meets the criteria for navigation. Since irrigation channels are primarily designed for water management and not for navigation, they typically do not fall under the scope of navigable waters as defined by the Act.

Here again, while the final answer from ChatGPT 4o mini was correct, the reasoning was riddled with errors and hallucinations. Notably, ChatGPT 4o mini failed to pick up on the existence of section 2.01 – the only provision in the CNWA that references “artificial irrigation channels”. It also again generated an incorrect citation of the section 2 definition of “navigable water”.

Finally, we decided to direct ChatGPT 4o mini to the section 2.01 “for greater certainty” clause in the Act to see if it would lead to a more accurate generative AI answer.

Below is our third question and ChatGPT 4o mini’s response:

You forgot to consult section 2.01 of the Canadian Navigable Waters Act. Review this section and let me know if you would like to change your original answer (and if so, how).

 You're right; Section 2.01 of the Canadian Navigable Waters Act (NWA) is crucial for understanding the scope of what constitutes a "navigable water." Let's review it:

Section 2.01 of the Canadian Navigable Waters Act

Section 2.01 states:

"For the purposes of this Act, a body of water that is artificially created is not a navigable water unless it is used or capable of being used for navigation by a vessel."

Implications for Artificial Irrigation Channels

According to Section 2.01, an artificial body of water, such as an irrigation channel, is not considered navigable unless it meets the following conditions:

- **Use for Navigation:** The channel must be used for navigation.
- **Capability of Navigation:** The channel must be capable of being used for navigation by a vessel.

Applying Section 2.01 to the Irrigation Channel Example

Given the specific provision in Section 2.01, here's how it affects the determination:

1. **Artificial Creation:** Since X is an artificial irrigation channel, it is not automatically considered navigable.
2. **Criteria for Navigability:**
 - **Used for Navigation:** If X is used for navigation (e.g., if boats or other vessels travel through it), it might qualify.
 - **Capable of Being Used for Navigation:** Even if it is not currently used for navigation, if X is designed and maintained in a manner that could support navigation by a vessel, it might be considered navigable.

Conclusion

Considering Section 2.01, the original conclusion needs adjustment:

- If X is solely an irrigation channel and is neither used nor capable of being used for navigation, it would not be considered navigable under the NWA.
- If X is used or could be used for navigation, despite being artificial, it would be classified as navigable water according to the NWA.

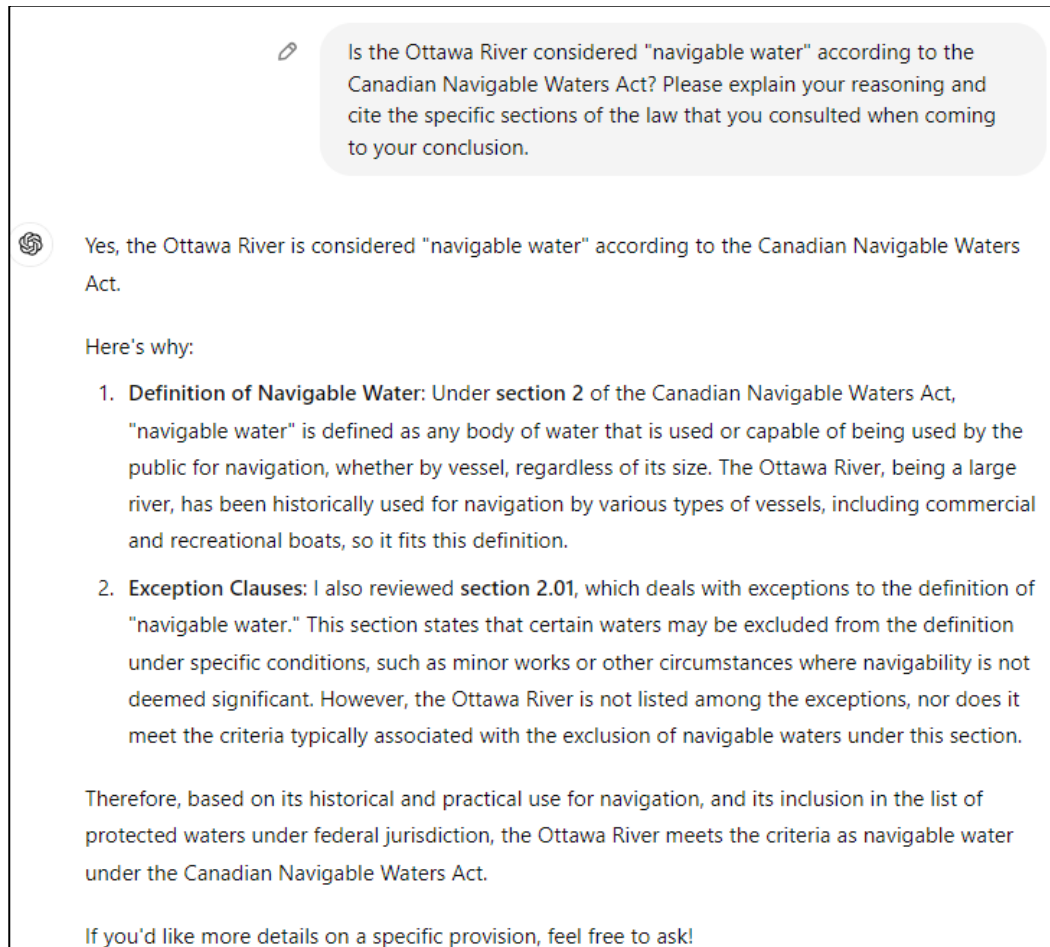
Thus, Section 2.01 clarifies that artificial bodies of water are excluded from being considered navigable unless they meet the criteria for use or capability for navigation.

ChatGPT 4o mini generated further errors in response to this last question, hallucinating a completely inaccurate alternative version of the text of section 2.01 and citing it as the basis for its answer. By contrast, when Blawx was asked about whether an artificial irrigation channel could be a “navigable water” under the CNWA (see *Blawx Encodings – Test 2: Artificial Irrigation Channel* above), it generated output that accurately, consistently, and clearly explained why such a body of water could not meet the Act’s definition criteria.

ChatGPT 4o – Definition of “Navigable Water”

The ChatGPT 4o mini results in relation to the definition of “navigable water” were worse than expected, so we decided to test the GPT 4o model as well. ChatGPT 4o is aimed at reducing hallucinations but at a higher cost per token. While the results from ChatGPT 4o were much better, this model was also prone to hallucination and error.

Below is our question and ChatGPT 4o’s response:



The screenshot shows a chat window with a question in a grey bubble and a response in a white bubble. The question asks if the Ottawa River is considered "navigable water" under the Canadian Navigable Waters Act, requesting reasoning and specific legal citations. The response is a detailed, structured answer that identifies the relevant sections of the Act and explains how the Ottawa River fits the definition.

Is the Ottawa River considered "navigable water" according to the Canadian Navigable Waters Act? Please explain your reasoning and cite the specific sections of the law that you consulted when coming to your conclusion.

Yes, the Ottawa River is considered "navigable water" according to the Canadian Navigable Waters Act.

Here's why:

- Definition of Navigable Water:** Under section 2 of the Canadian Navigable Waters Act, "navigable water" is defined as any body of water that is used or capable of being used by the public for navigation, whether by vessel, regardless of its size. The Ottawa River, being a large river, has been historically used for navigation by various types of vessels, including commercial and recreational boats, so it fits this definition.
- Exception Clauses:** I also reviewed section 2.01, which deals with exceptions to the definition of "navigable water." This section states that certain waters may be excluded from the definition under specific conditions, such as minor works or other circumstances where navigability is not deemed significant. However, the Ottawa River is not listed among the exceptions, nor does it meet the criteria typically associated with the exclusion of navigable waters under this section.

Therefore, based on its historical and practical use for navigation, and its inclusion in the list of protected waters under federal jurisdiction, the Ottawa River meets the criteria as navigable water under the Canadian Navigable Waters Act.

If you'd like more details on a specific provision, feel free to ask!

Compared to ChatGPT 4o mini, ChatGPT 4o did a much better job in identifying both section 2 and section 2.01 as key provisions of the CNWA relating to the definition of

“navigable water”, and the answers reused more of the original legislative text. However, ChatGPT 4o still made a number of significant mistakes, for example:

- The way ChatGPT 4o described “use by the *public* for navigation” as a core component of the definition of “navigable water” was incorrect. The presence of “public access” to the body of water is only one of three ways by which a body of water could be a “navigable water” according to paragraphs (a) to (c) of the definition of “navigable water”.
- ChatGPT 4o’s reference to “whether by vessels” is grammatically incorrect. It seems that ChatGPT 4o is describing the use by vessels as an optional element of the definition when it is actually part of a core requirement.
- ChatGPT 4o also hallucinated while describing the application of section 2.01. Instead of exclusively discussing the non-application of the “navigable water” definition to artificial irrigation channels and drainage ditches, it referenced elements that are not in section 2.01, such as “minor works” and the concept of a list of exceptions.
- Like ChatGPT 4o mini, ChatGPT 4o did not mention the element of the definition concerning use by Indigenous peoples (relevant to Scenario 2 of the opening passage of the definition), nor the regulatory carve-out in paragraph 28(1)(g.1).²³

By contrast, Blawx did not commit any of the above errors as it reliably cited the law and explained how each section applied given the specific facts provided by the user.

Lesson 2: When it comes to digitizing rules in a way that is accurate, explainable and transparent, Rules as Code has an advantage over generative AI

The second lesson illustrated by this exercise – another lesson relevant to the use of AI in the legislative space – is that Rules as Code has an advantage over generative AI when it comes to digitizing rules in a way that is accurate, explainable and transparent. In this case, comparing the output of the Blawx encodings (symbolic AI) to that of ChatGPT (generative AI) revealed that the Blawx output and explanation were accurate, while the ChatGPT output contained significant errors. In addition, Blawx provided detailed explanations for its conclusions while ChatGPT did not explain its behind-the-scenes process (instead, it simply tried to “predict” what such an explanation might be).²⁴

It is important to recognize that generative AI models like ChatGPT are providing users with unvalidated “word prediction” models. More specifically, they are models that predict “tokens”, which can be words, subwords, or individual characters. This type of prediction

²³ ChatGPT4o also mistakenly made references to sections 3, 4 and 29 of the CNWA. The explanations for the sections were also prone to error to the point that displaying and unpacking them in this article would have required more space than we had.

²⁴ See also P. Burgess, *AI and the Rule of Law: the Necessary Evolution of a Concept* (Bloomsbury Publishing, 2024) at p 113.

performed by neural networks is not the same thing as the logical “reasoning” performed by rules-based, deterministic symbolic AI tools like Blawx. A commonly-used analogy for the differences in these types of AI comes from psychology: whereas ChatGPT is akin to “System 1” thinking (automatic, fast, intuitive, and prone to error and bias), Blawx is akin to “System 2” thinking (deliberate, slow, and logical).²⁵ While context-stuffing (packing relevant information such as URL links into a prompt), fine-tuning, Retrieval Augmented Generation (RAG) and Chain-of-Thought (CoT) can help yield somewhat higher-quality predictions from generative AI, the generations are still inherently not reasoning-based and therefore not explainable (and still prone to error and hallucination).²⁶

Furthermore, the “black box” nature of generative AI tools means it will not be possible to see how the tool came to the generated conclusion. In other words, even if generative AI tools can appear to provide explanations for the answers they produce, these explanations are also merely “predictions” (often inaccurate ones) of what a potential explanation *could* be, and *not* the true basis for their conclusions. The inherent limitations of generative AI in terms of accuracy, explainability, and transparency are of particular concern in the legal and legislative context, as accuracy, explainability and transparency are key components of the rule of law.²⁷

Part 3 – Testing a Hybrid Blawx-ChatGPT Approach to Interpreting “Navigable Water”

In this part, we will describe the test we did to assess the quality of the output of *combining* our Blawx encodings with ChatGPT. ChatGPT is not known for its accuracy, explainability or transparency, but it is known for its capacity to summarize concepts in plain language. While this article’s title is “Rules as Code *versus* ChatGPT”, we were curious to see if an approach that used both Rules as Code *and* ChatGPT could yield results that brought together the best of both worlds: the accuracy, explainability and transparency of a logic-based Rules as Code tool, on the one hand, and the plain language capabilities of neural network-based ChatGPT, on the other.

Blawx and ChatGPT 4o mini – Definition of “Navigable Water”

To test this hybrid/neuro-symbolic Blawx-ChatGPT approach, we gave ChatGPT 4o mini a short prompt (shown below) and copied-and-pasted a detailed Blawx explanation into its conversation window (the Blawx explanation is not shown in the image to save space, but it appeared after the prompt). The Blawx explanation was based on a combination of Scenario

²⁵ P. Jean & Forbes Technology Council, “When To Use Symbolic And Generative AI” (June 2024) *Forbes* <https://www.forbes.com/councils/forbestechcouncil/2024/06/05/when-to-use-symbolic-and-generative-ai/> (accessed November 3, 2024).

²⁶ We repeated both ChatGPT exercises using context-stuffing practices (i.e. by providing a URL to the CNWA). This helped to reduce the risk of hallucination when referencing the text of the rules, but it did not significantly improve the quality of the legal conclusions that were generated.

²⁷ Burgess at pp 61, 156, 157 and 161: “The need for transparency is a key component of the Rule of Law [...]. After all, in many respects the judicial system is based not only on the principal [sic.] that the right decision is arrived at, but that the right decision can be seen to have been arrived at [...]. The inability of [generative] AI to be able to provide explanations of its decision making [...] represents a fundamental Rule of Law problem.”


1 and paragraph (a) leading to the conclusion that the Ottawa River was a “navigable water”. The same exercise could be repeated for each of the four Blawx explanations that were generated by this test.

When asked to summarize the explanation generated by our Blawx encodings, ChatGPT 4o mini’s summary correctly indicated how the Ottawa River met the Act’s “navigable water” definition under paragraph (a) (based on our initial input into Blawx that “body of water ottawa_river is publicly accessible by land or by water”). It also indicated that the Ottawa River was not an artificial irrigation channel or drainage ditch under section 2.01 and that the Governor in Council had not excluded it from the definition of “navigable water” through a regulation made under paragraph 28(1)(g.1).

Below is a prompt with our Blawx input and ChatGPT 4o mini’s summary:

What follows is an automatically generated explanation stemming from encoded version of a rule. Restate it in plain language without restating mathematical calculations and without further justifying conclusions for which there is only an absence of evidence in support. Please link conclusions to specific parts of the law and provide to the user a clear explanation of the reasoning.

{Blawx explanation}



The Ottawa River is classified as a navigable water according to Section 2 of the law. Here's why:

1. **Definition of Navigable Water:** According to Section 2, the Ottawa River qualifies as a navigable water because it is a body of water used, or likely to be used, by vessels for transport or travel. This use can be for commercial or recreational purposes, either all year or part of the year.
2. **Accessibility:** The Ottawa River is publicly accessible either by land or by water, which meets the criteria outlined in Section 2, Paragraph a.
3. **No Evidence Against Navigability:** There is no evidence that contradicts the conclusion that the Ottawa River is a navigable water. Specifically:
 - It has not been shown that the river is an artificial irrigation channel or drainage ditch.
 - There is no indication that the Governor in Council has excluded the Ottawa River from the definition of navigable water provided in Section 2.

Thus, based on the information provided, the Ottawa River remains classified as a navigable water under Section 2 of the law.

ChatGPT’s summary of the Rules as Code encodings was largely accurate. Its description of the definition was close to the actual legislative definition. It correctly cited a specific paragraph (paragraph (a)) that would apply based on our input that the Ottawa River is publicly accessible. It also correctly noted that there was no evidence that contradicted the conclusion that the Ottawa River is a “navigable water”, referencing the exception for

artificial irrigation channels as well as the Governor in Council’s ability to exclude bodies of water from the definition by regulation. There were some minor issues, such as the reference to “Section 2, Paragraph a” (which, as mentioned earlier, is due to Blawx not yet having more advanced reference functionalities). However, overall, the quality of ChatGPT’s summary based on the Blawx input was very good. This initial experiment demonstrated that using encoded rules (a Rules as Code/symbolic AI approach) as a foundation can help AI tools interpret legislation with more accuracy, explainability and transparency than if they rely on a purely generative AI approach.²⁸

Note: While Rules as Code can significantly improve the quality of the generative AI text, the plain language summaries should be accompanied by detailed Blawx explanations and the relevant legislation for greater explainability and transparency.

Lesson 3: Combining Rules as Code with generative AI may provide a path to making the digitization of rules trustworthy, practical, and scalable

The third lesson from this exercise is that, rather than choosing between Rules as Code and generative AI when digitizing rules, a better approach may be to combine the strengths of both types of AI to get the best of both worlds. In this case, a hybrid approach combining Blawx encodings with ChatGPT generated output that was plain language (due to ChatGPT’s predictive language technology) yet maintained accuracy, explainability and transparency (due to Blawx’s reasoning capabilities). While Part 3 was limited to showing the use of ChatGPT to summarize Blawx (Rules as Code) reasoning, it is worth noting that there are other ChatGPT abilities that could be combined with Rules as Code. Notably, because of ChatGPT’s conversational functionality, it would be possible to combine Blawx (or another Rules as Code tool) and ChatGPT (or another generative AI chatbot) to create a conversational chatbot, based on Rules as Code, that prompts users for relevant information and produces output conversationally.²⁹

In addition, with the emergence of symbolic AI-based LLMs like Logic-LM, it may be possible in the coming years to autogenerate high-fidelity initial drafts of rule encodings directly from legislative texts.³⁰ Validation by human legal experts would still be needed, but having an automated initial draft of rule encodings could significantly streamline code drafting and validation and allow the use of Rules as Code to scale more quickly.

²⁸ Martin’s team is working on integrating generative AI summaries into the current version of Blawx.

²⁹ M. Perron, A. Logie and J. Turner, “EN Team 7 - Develop ‘rules as code’ chatbots for use in public services” (August 2024) *Global Government Forum* <https://www.youtube.com/watch?v=U1z4TLBO4WQ> (accessed September 27, 2024).

³⁰ Logic-LM: “Empowering Large Language Models with Symbolic Solvers for Faithful Logical Reasoning” <https://arxiv.org/abs/2305.12295> (accessed September 27, 2024). The legal computational expert who first developed Blawx (Jason Morris) is also working on an LLM integration that helps autogenerate a first draft of code: <https://www.linkedin.com/feed/update/urn:li:activity:7218822246675439616/> (accessed September 27, 2024).

Conclusion

This article explored the process of converting a Canadian legislative provision into code using Blawx and compared the quality of output of the Blawx encodings against the quality of output from ChatGPT 4o mini and ChatGPT 4o. The findings illustrated the hidden complexities of statutory interpretation, the risks of relying too heavily on programmers or generative AI for interpreting legislation, and the importance of developing Rules as Code tools specifically designed to be user-friendly for rule makers. In this experiment, the ChatGPT “black box” generated answers that contained significant hallucinations and lacked explainability and transparency. By contrast, both Blawx and the hybrid Blawx-ChatGPT approach were “clear boxes” and yielded answers that were accurate and grounded in logical explanations and in traceable software processes. When it comes to digitizing legislative rules in an accurate, explainable and transparent way, we consider that logic-based systems like Blawx or Rules as Code-based LLMs hold more potential than approaches that rely solely on neural network-based tools like ChatGPT.

As legislative counsel start to explore potential uses for AI in the legislative drafting space, here are a few questions for them to consider (noting that the answers may vary depending on the specific use case):

1. What is the level of accuracy, explainability and transparency that is desired or needed for the AI use case? How will accuracy, explainability and transparency be assessed and who will assess them?
2. Can the type of AI selected (e.g. generative AI) meet the level of accuracy, explainability and transparency required? If not, are there other types of AI (e.g. symbolic AI), or hybrid approaches (e.g. neuro-symbolic AI), that could do so?
3. What skills and training would legislative counsel benefit from to support their use of diverse forms of AI in the legislative space?

Annex

As an experiment, we asked ChatGPT (Auto) to “explain” whether Blawx or ChatGPT provide more accurate and explainable answers. Since its answer was, in this case, largely accurate, we decided to include it in this Annex. One error ChatGPT made was assuming that Blawx “encodes” legal provisions; in reality, Blawx does not create the encodings, but rather enables encodings to be done and validated by lawyers, including legislative counsel.

If a legal provision has been encoded into Blawx by legal experts, would ChatGPT or Blawx provide more accurate and explainable answers in response to legal questions about that provision? Please explain your answer in less than 200 words.



If a legal provision has been encoded into Blawx by legal experts, Blawx would provide more accurate and explainable answers compared to ChatGPT.

Accuracy: Blawx encodes legal provisions as specific rules, ensuring answers that directly reflect the encoded law without deviation. It applies the rules consistently, making its answers precise and reliable for legal questions about the provision.

Explainability: Blawx is designed to show the exact reasoning behind each decision, providing step-by-step transparency on how a conclusion is reached based on the encoded rules. This is essential for legal contexts, where understanding the logic behind a decision is crucial.

ChatGPT's Limitations: ChatGPT generates responses based on patterns from its training data and does not have explicit, rule-based encoding of specific legal provisions. While it can provide general explanations, its answers are not traceable to specific laws and may lack accuracy, consistency, and explainability.

Conclusion: Blawx, when encoded by legal experts, offers precise, consistent, and fully explainable responses tailored to the provision, making it far superior for answering specific legal questions compared to ChatGPT.

It's All Coming Back (Into Force) To Me Now: A Comment on *Reference re Family Services Act and the Child and Youth Well-Being Act, 2024 NBCA 42*

Charlie Feldman¹



Abstract

A Canadian court was recently asked to determine when a new Act came into force. The legislation contained no commencement provision and the relevant Interpretation Act provided that the coming into force of such bills is upon Royal Assent. However, the Act coming into force on royal assent would create an unintended and significant legislative gap. The Court's reasoning identified a different coming into force for the Act, bridging the gap errantly enacted by the legislator. This article presents the circumstances of this case and offers some commentary on the reasoning provided by the Court.

Introduction

In January 2024, the Government of New Brunswick (Canada) asked the province's highest court for its opinion on when a new Act of the legislature came into force. While this question would traditionally be answered by examining the statute and relevant *Interpretation Act*,² the fact pattern presented a delicate problem. New Brunswick's child protection regime was set out in the long-standing *Family Services Act*,³ and was to be replaced by the *Child and Youth Well-Being Act* enacted in 2022.⁴ The 2022 Act had not come into force, as regulations were being developed and a consequential statute was required. The consequential statute was the one at issue – it repealed the relevant portions of the long-standing Act and modified the 2022 Act so that it could be brought into force and

¹ Charlie Feldman is President of the Canadian Study of Parliament Group. The views in this paper are not those of any employer. Thank you to the various people who reviewed prior versions of this text, in particular John Mark Keyes and Aleks Hynnä.

² In this instance, *Interpretation Act*, RSNB 1973, c I-13.

³ S.N.B. 1980, c. F-2.2.

⁴ S.N.B. 2022, c. 35.

operate as intended. The consequential statute was enacted on December 13, 2023 as *An Act Respecting Child and Youth Well-Being*,⁵ but contained no commencement provision and therefore came into force on royal assent by operation of the *Interpretation Act*.⁶ The technical legal result? Upon royal assent of the 2023 Act, the child protection regime under the long-standing *Family Services Act* was repealed, but the *Child and Youth Well-Being Act* enacted in 2022 was still not in force, thereby creating a gap in which the province had no in-force child protection legislation.

Once the issue was realized, the 2022 Act was brought into force along with the new required regulations on January 25, 2024. However, there was no legal certainty in respect of the period from the repeal of the regime under the *Family Services Act* until January 25, 2024 (inclusive), 44 days in which there was no in-force child protection regime.⁷ The Government initiated a reference case⁸ – that is, a question from the government to the Court asking for an advisory opinion⁹ – to determine when the consequential statute (2023) came into force and, if there was a gap, whether the court should fill it using its *parens patriae* jurisdiction.

On March 7 2024, New Brunswick’s Court of Appeal released its written opinion in *Reference re Family Services Act and the Child and Youth Well-Being Act*¹⁰ (the “Reference”). The Court read in an implied coming into force into the 2023 legislation, tying it to the 2022 legislation to avoid “chaos”, and found that any other solution would be “to indulge a total absurdity”.¹¹ In answering the second question, the Court also found that *parens patriae* or inherent jurisdiction could fill the legislative void similarly.

While the result of a reference case is an advisory opinion, the Attorney General of New Brunswick was the only party to the matter, meaning that there was no prospect of an appeal. Regardless, a remedial bill based on the Court’s opinion was since enacted to provide legal certainty in respect of acts occurring during the gap period.¹²

There is no question that the Court’s approach ensured that children – particularly vulnerable members of society – did not go without legislation to protect them, something

⁵ S.N.B. 2023, c. 36.

⁶ R.S.N.B. 1973, c. I-13 at ss 3(2).

⁷ Note that there is a presumption against retroactivity of new legislation and that there are important provisions about retroactive offences (see, e.g. 11(g) of the *Canadian Charter of Rights and Freedoms*).

⁸ For more on reference cases, see K. Puddister, *Seeking the Court’s Advice: The Politics of the Canadian Reference Power* (UBC Press, 2019) and C. Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Hart, 2019).

⁹ As explained by the Supreme Court of Canada in *Reference re Code of Civil Procedure (Que)*, art. 35, 2021 SCC 27 at para 152: “[n]otwithstanding their advisory — and therefore, in principle, non-binding — nature, opinions given in references are in practice treated as judicial decisions and are followed by other courts”.

¹⁰ *Reference re Family Services Act and the Child and Youth Well-Being Act*, 2024 NBCA 42 [Reference].

¹¹ Reference at para 50.

¹² *An Act Respecting An Act Respecting Child and Youth Well-Being*, S.N.B. 2024, c. 6, discussed further below.

the Court noted was required under the *United Nations Convention on the Rights of the Child*.¹³ However, the Court's decision can be critiqued for how it arrived at this result and for its observations along the way. What follows are comments on various aspects of the Court's reasoning, which appears to be unique Canadian jurisprudence.

Scrutinizing the Timeline

After the consequential Act received assent on December 13, 2023, the Legislature adjourned until March 19, 2024.¹⁴ In its opinion, the Court underscored the “absence of a legislated solution”¹⁵ and observed that the “a legislative solution [...] is not offered as the Legislature is not sitting”.¹⁶

The Order in Council seeking the reference is dated January 30, 2024.¹⁷ In practice, the reference questions had to be developed and approved by the Cabinet, a process that does not typically occur overnight. The Court opinion itself states that the issue was noticed on January 12,¹⁸ a fact stated in the Attorney General's submission to the Court as follows:

The lack of the routine “coming into force” provision in *An Act Respecting* was unintended and resulted purely from a drafting error which went unnoticed by anyone until January 12, 2024. It was contrary to the intentions of the drafters and the Legislative Assembly.¹⁹

The submission of the Attorney General also states that “The Legislative Assembly, had it addressed the issue, would have inserted the provision to ensure the *Family Services Act* was not repealed prior to the legislation replacing it”.²⁰

This is a first point of interrogation: could the legislature legislate to cure this legislative issue? While the Court declares that there was no “solution” given the lack of a sitting legislature, the legislature was not dissolved for an election. Thus, the legislature could simply be recalled. Since June 16, 2023, the legislature had been operating under the provisions of a Special Order allowing for a recall during an adjournment:

During any period of adjournment, including constituency and committee weeks, if the Government advises the Speaker that the public interest requires the House to meet on an earlier day, and the Speaker is so satisfied, the Speaker may give notice that the House shall meet and in such notice shall state a day on which the House shall meet,

¹³ Reference at para 8.

¹⁴ Journals of the Legislative Assembly of New Brunswick, December 13, 2023 at p 1.

¹⁵ Reference at para 50.

¹⁶ Reference at para 49.

¹⁷ New Brunswick OIC 2024-019E.

¹⁸ Reference at para 15.

¹⁹ Submission on behalf of the Attorney General of New Brunswick, Court File No.: 14-24-CA at para 42 [AG Submission].

²⁰ AG Submission at para 113.

and thereupon the House shall meet on the day so stated to transact its business as if it had been duly adjourned to that day.²¹

Even in the absence of a special order, there would still be a way for the legislature to be reconvened if absolutely necessary. The session could have been prorogued and legislators summoned quickly to pass remedial legislation.²² There is no clear basis for the Court's conclusion on the legislature's unavailability, which does not appear to be discussed in the Attorney General's submission.

If the legislature were reconvened, the government would have needed to have a bill ready to address the issue. This is where a practical issue arises, keeping in mind that the Court noted that everyone seemed to be applying the former Act even though it had technically been repealed.²³ In the period between the matter becoming public and the introduction of remedial legislation, actors may have stopped applying that law or waited to see what the legislature would do.²⁴ Litigants may have raised arguments that one or the other regime was more favourable to them and should therefore be applied, or that no regime applied given the repeal. As such, if the legislature had been reconvened, the remedial bill might have had to address more complex situations where some matters in the gap period were addressed under parts of one or both schemes, as opposed to all matters having seemingly being treated as though the repealed scheme still applied.

To be clear, the point here is not that a legislated solution was a preferable or easy option but rather that it *was* an option. If one reads the Court's words strictly, one might assume that no mechanism existed for a legislative solution. In my opinion, a court should not suggest that a legislature cannot meet to legislate, barring the extreme case of a dissolution period or perhaps some sort of extreme natural disaster or war – events not remotely in play in the circumstances at the case. While it must be acknowledged that the government referred the matter to the Court for resolution and in this context the Court acted, I believe there would have been space for the Court to suggest, with all judicial politeness and comity, that options existed for a legislative rather than judicial solution and that such an approach might be preferable. As stated in the Attorney General's own submission, “[t]he Attorney General acknowledges that there is case law warning against judicial amendment of legislation”,²⁵ which is effectively the result here. It does not appear that the court fully canvassed the

²¹ Thank you to Patrick Dunn for directing me to the precise terms.

²² For discussion of the principle, see “Prorogation in order to recall the House to make it sit” in Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster System* (Cambridge University Press, 2018).

²³ Reference at paras 16-20.

²⁴ The practice of Canadian courts when they become aware of bills before the legislature that may impact litigation before them is varied. See C. Feldman, “Examen judiciaire des dispositions en cours de révision par le législateur” (2021) 51 *Revue générale de droit* at pp 15-46. <<https://doi.org/10.7202/1085788ar>>

²⁵ AG Submission, at para 46.

possibility or preferability of legislative solution as opposed to resolving the issue through a reference (note some courts have declined to answer reference questions²⁶).

Being Intentional about Intention

The Court's opinion²⁷ references both the "evident intention of the Legislature" and the "manifest intention of the Legislature,"²⁸ as well as the "intention of the Legislature"²⁹ (simpliciter) and "legislative intent".³⁰ In identifying this intention, the Court did not look to the Debates (Hansard) from the Legislative Assembly. In fact, there is not a single reference in the opinion to "debate", "Hansard", "transcript", "committee", and nor is there a quote from any legislator. It is generally understood that identifying legislative intent in the Canadian context nowadays – particularly when the meaning of a provision is unclear – is aided by going beyond statutes and looking at the parliamentary or legislative record,³¹ so why didn't the Court do this here? To note, the legislature was neither an intervener nor a party to the reference.

The Court spoke to the "very clear and obvious object of the legislative scheme, which was to replace the existing regime with a more modern one",³² and noted that "[t]he effect of these statutes coming into force almost simultaneously would be to replace the existing regime".³³ How did the Court conclude that there was to be a single point-in-time switch from one regime to the other? The opinion does not cite a source for the assertion that the 2023 law "once adopted, would come into force immediately after the coming into force"³⁴ of the 2022 law, though this is the case as advanced in the Attorney General's submissions, and compellingly so:

An interpretation of this legislation that results in the repeal of the child protection provisions of the Family Services Act about six weeks prior to the legislation intended to replace them would be absurd and unreasonable, and fail to reflect the intention of the Legislature or the scheme of the Act.³⁵

While there is no reason to doubt the Attorney General's submission about the Government's legislative intent, there is a small matter with which neither the Court nor the

²⁶ See K. Puddister, "A Question They Can't Refuse? The Canadian Reference Power and Refusing to Answer Reference Questions" (2019-2020) 13:1 *Canadian Political Science Review* at pp 34-53.

²⁷ Note that this case comment is based on the English version of the opinion only.

²⁸ Reference at para 29.

²⁹ Reference at para 33.

³⁰ Reference at paras 35, 50.

³¹ S. Barker & E. Anderson, *Researching Legislative Intent: A Practical Guide* (Irwin Law, 2019). However, note that the Supreme Court of Canada has cautioned that "the frailties of Hansard evidence are many": *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para 35.

³² Reference at para 48.

³³ Reference at para 12.

³⁴ Reference at para 12.

³⁵ AG Submission at para 42.

submissions engaged but that is worth pondering when considering the full range of legislative possibilities. The Order in Council giving rise to the reference notes that “[t]he *Child and Youth Well-Being Act*, was introduced in the 1st session of the 60th Legislature on May 18th, 2022, and received Royal Assent on June 10th, 2022, coming into force on a day or days to be fixed by proclamation”.³⁶ The “day or days” formulation allows for a staggered coming into force. This could mean that the legislation was not actually meant to be replaced all on one day but that it could have been phased in. In reaching the conclusion that an implied coming-into-force clause fixes the date for the 2023 repeal statute as being the date on which the entire new 2022 scheme comes into force, the Court did not allow for the possibility of a staggered or only partial coming into force (authorized by the “day or days” formulation). Surely, the Court was informed by the events that occurred and that the whole 2022 Act was proclaimed on one day even though it would have been possible to proclaim its various provisions on different days. The eventual Order in Council read:

Under section 155 of the *Child and Youth Well-Being Act*, Chapter 35 of the *Acts of New Brunswick, 2022*, the Lieutenant Governor in Council orders a Proclamation to be issued declaring that the said Act comes into force on January 26, 2024.³⁷

Nothing in the record of debate suggests that the legislature sought a phased-in approach and this is not to suggest that the Government did not know its own intentions. The point is that the Court found a single point-in-time coming-into-force for the 2023 legislation when it could have matched the 2022 legislation by also containing a similar “day or days” coming into force provision.

Another possibility to consider is whether an additional amending bill might have been introduced. Imagine that while consulting on the regulations, the government spotted an issue in either the 2022 or 2023 Act. The government could return to the legislature to amend either Act before the relevant provision(s) came into force. Indeed, it is possible to amend enacted legislation before it comes into force.

To illustrate with an example from the federal sphere, Parliament enacted *An Act to amend the Criminal Code and the Canada Labour Code*³⁸ in 2021. It contained amendments to the *Canada Labour Code* providing leave related to the loss of a child with a coming into force to be fixed by order. Those provisions were not brought into force but amendments were made to the 2021 Act by a 2022 law, the *Budget Implementation Act, 2022, No. 1*.³⁹ With the 2021 provisions (modified by the 2022 Act) still not in force, further amendments were introduced in a 2023 Bill, C-59, the *Fall Economic Statement Implementation Act, 2023*, which contained amendments to both the *Canada Labour Code* and the 2021 Act in respect of this same scheme and was enacted in 2024.⁴⁰ The point is that provisions one might

³⁶ New Brunswick OIC 2024-019E.

³⁷ New Brunswick OIC 2024-006E.

³⁸ S.C. 2021, c. 27.

³⁹ S.C. 2022, c. 10 at Part 5, Division 29.

⁴⁰ *Fall Economic Statement Implementation Act*, S.C. 2024, c. 15, Division 2 of Part 5, at ss 199-208.

expect to come into force may be further amended one or more times by further enactment *before* being brought into force. Again, this is just to illustrate that other legislative possibilities existed. While it would not be expected for a Court to be keenly aware of every imaginable legislative quirk, it is assuming at some level that the choice was between the legislative text as enacted being in-force or not-in-force whereas the text could have been further changed before coming-into-force. Again, this is where one might suggest that where multiple legislative possibilities exist, it could be preferable to leave the matter to the legislature.

As a final comment on intention of the legislator, note that New Brunswick's *Interpretation Act* begins by stating that

[t]his Act extends and applies to every enactment and regulation except in so far as it is inconsistent with the intent or object of the enactment or regulation.⁴¹

Accordingly, the *Interpretation Act* rule that the absence of a commencement provision means the legislation comes into force on assent could be found inconsistent with the 2023 Act's intent or object such that the *Interpretation Act* rule would not operate. The Court did not explicitly delve into this question of contrary intention under the *Interpretation Act*. As such, the Court speaks to the "intent" of the legislator but does not explicitly reconcile whether this intent could have nullified the *Interpretation Act* rule such that the provisions at issue were not repealed simply by operation of law.

Gap? Error? Correction?

The Court stated that "[t]he absence of a coming into force clause was undeniably a simple legislative oversight which, if caught, would have been immediately corrected".⁴² It also characterized the omission as "a simple and obvious drafting error".⁴³ The Court did not cite evidence to support the proposition that an oversight in legislation would be immediately corrected. The Court cannot predict what the legislature would do in any given case. Indeed, there are instances where legislative oversights are noted but not corrected.

Goofs, errors, or oversights (however called) in bills may be noticed but not corrected by the legislature for various reasons. An example from the Canadian Parliament is found in Bill C-394 from the 41st Parliament, as amended. As introduced, the bill enacted an offence for someone who recruits, solicits, encourages or invites a person to join a criminal organization.⁴⁴ At committee in the House of Commons, the text was amended to add coercion to the list; however, coercion was not added to a later mandatory minimum penalty provision of the bill.⁴⁵ The strict result is that if you recruit, solicit, encourage or invite

⁴¹ R.S.N.B 1973, c. I-13 at ss 1(1).

⁴² Reference at para 50.

⁴³ Reference at para 29.

⁴⁴ As introduced: <<https://www.parl.ca/documentviewer/en/41-1/bill/C-394/first-reading/page-27>>

⁴⁵ As amended: <<https://www.parl.ca/documentviewer/en/41-1/bill/C-394/second-reading/page-27>>

someone under 18 to join a gang, a mandatory minimum penalty applies, but it does not apply if you coerce that same young person to join a gang.⁴⁶ The inconsistency was raised before a Senate committee and both the sponsor of the bill and the Government witness agreed that ideally this would be addressed.⁴⁷ In other words, everyone agreed this was an oversight that should be corrected. However, the sponsor of this private member's bill had become a parliamentary secretary during the bill's legislative journey so procedurally the bill would be dead if amended by the Senate and sent back to the House of Commons.⁴⁸ The committee therefore decided not to amend the bill but noted the issue.⁴⁹ The Bill received royal assent in June 2014 and now, nearly a decade later at the time of this writing, section 467.111 of Canada's *Criminal Code*⁵⁰ retains this discrepancy of "coercion" not appearing in paragraph (a) but appearing in the portion that precedes it.

Without dwelling on the source of the problem – and recognizing that everyone (author included!) makes mistakes – the Court's characterization of the matter as a "simple and obvious error" is curious because one might expect someone to notice an "obvious" error in a document that many eyes would have seen. Further, one might question why neither the judges nor lawyers who acted in the gap period recognized they were operating under a repealed regime.⁵¹ Without seeking to wordsmith the Court's decision, one might wonder whether a characterization like "subtle" perhaps gives more credit to the many eyes that missed the missing clause.

In addressing the missing clause, did the Court bridge a gap or correct an error? In many places, the Court spoke to its role in interpreting statutes. It noted, for example, that

In the face of legislative oversights, common law principles provide mechanisms that, while not granting courts legislative authority, empower them to interpret and, where necessary, bridge gaps within the legislation.⁵²

It also stressed that "in our view, all these statutory interpretation principles inform the real question in the present case".⁵³

⁴⁶ Of course, some behaviour that might constitute "coercion" could be caught by the other offence verbs.

⁴⁷ See *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs* for May 28, 2014 (sponsor) and May 29 (government).

⁴⁸ See the "Observations" in the *Ninth Report of the Standing Senate Committee on Legal and Constitutional Affairs*, May 29, 2014 [Senate Observations].

⁴⁹ Senate Observations.

⁵⁰ R.S.C., 1985, c. C-46.

⁵¹ Reference at para. 20. It is conceded, of course, that the relevant judges were unlikely to have arguments before them in this regard, that the relevant laws websites and databases may not have been updated quickly to reflect the repeal, and that both judges and lawyers are generally unlikely to pursue side research on a possible statutory validity question if everyone seemingly accepts the relevant scheme as operative. The point here is that the issue in context is perhaps less obvious than contended by the Court.

⁵² Reference at para 4.

⁵³ Reference at para 39.

While approaching the matter as a question of interpretation, the Court did not address the long-standing presumption of perfection in statutes,⁵⁴ which is often a starting point. In reaching its final pronouncement, the Court emphasizes a passage from Ruth Sullivan’s *The Construction of Statutes* reading “most courts do not hesitate to correct the drafting mistake”.⁵⁵ The Court did not engage with what Sullivan says just a few pages later – that “[w]hile courts are willing to correct drafting errors, they are reluctant to fill gaps in legislation”.⁵⁶ This is an approach the Federal Court of Appeal has adopted.⁵⁷ It is not clear whether the Court in the Reference is drawing a distinction between correcting an error and bridging a gap. It is also not clear how one or both of these approaches relate to “inferring” or “reading in” a coming-into-force, both of which the court says it is doing.

Specifically, the Court found that “reading in a commencement provision is the only way”,⁵⁸ and stated that “[t]his case epitomizes the judicial capacity to infer a commencement provision within a statute, notwithstanding the absence of an explicitly articulated clause”.⁵⁹ However, the clause it read in (or inferred) might have differed from the one the 2023 Act would have included. That is, the bill would likely have been introduced with a clause reading “this Act or any provision of it comes into force on a day or days to be fixed by proclamation”. Through its opinion, the Court effectively found a clause along the lines of “this Act comes into force on the first day on which all provisions of the *Child and Youth Well-Being Act*, Chapter 35 of the Statutes of New Brunswick, 2022, are in force”.⁶⁰ The Court did not acknowledge that its “inferring” or “reading in” involved policy choices and was distinct from, for example, fixing a drafting error that is an obvious typo.

To think of this last point in a different way, consider that when the 2023 bill was introduced, the legislature would have had no idea when the 2022 legislation would, if ever, come into force. Even upon assent of the 2023 legislation, the legislator wouldn’t know with certainty when the 2022 bill would, if ever, come into force (recall that the provisions of the Act could be proclaimed in force on a “day or days”) or whether either the 2022 or 2023 Act may have required further amendment prior to its being brought into force. If the Court is filling a gap by bridging the two regimes at a single point in time, it is doing so with knowledge that legislators would not and – and more importantly– could not have had when

⁵⁴ “Legislation is presumed to be accurate and well-drafted; it is presumed that the legislature does not make slips of the pen.” R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (LexisNexis, 2008), cited in decisions such as *Apotex Inc. v. Merck & Co. Inc.*, 2008 FC 1185 at para 98.

⁵⁵ Reference at para 38, citing R. Sullivan, *The Construction of Statutes*, 7th ed (LexisNexis, 2022) at pp 366-367.

⁵⁶ Sullivan, 7th ed, at 371.

⁵⁷ *Canada (Attorney General) v. Vorobyov*, 2014 FCA 102.

⁵⁸ Reference at para 49.

⁵⁹ Reference at para 4.

⁶⁰ Recall that some provisions of the 2022 Act would have been in force on assent such as the title and the coming into force provision itself.

enacting the 2023 bill because of choices they themselves made in enacting the 2022 legislation that was not yet then in force.

An Uneasy Precedent

It is unclear where one goes from this decision both in terms of the result and in terms of the reasoning. Should legislatures spell out that “this Act comes into force on royal assent” to guard against adverse interpretation instead of relying on the *Interpretation Act*, which was seemingly set aside by the Court in this instance? Might courts now interrogate coming into force more than they may have previously?⁶¹ And, can we expect more coming-into-force-related arguments from litigants who are – for lack of a better phrase – trying everything in the hopes that something sticks?

The Reference’s opening words are as follows:

In the intricate machinery of a Legislative Assembly, the processing of voluminous documents is an inevitability. Within such a framework, the government employs robust systems designed to minimize errors, but even the best systems are not devoid of fallibility. On occasion, lapses do occur, underscoring the imperfection inherent in human endeavours.⁶²

We all accept that mistakes are bound to happen. One may inquire whether legislators are equipped for the technical challenges of law-making, particularly when incidents like this occur. But the Reference opinion’s lack of inquiry into what the legislature did (or didn’t do) and lack of guidance for the future – simultaneously lets the legislature off the hook for something it was to scrutinize while perhaps opening the door for more suggestions of shortcomings in legislation. That said, it is unlikely that we will see the floodgates open and judicial resources wasted on new suggestions of gaps and errors in legislation solely built on coming-into-force arguments. It is far more likely for disputes to arise over the constitutionality of a scheme or meaning of substantive provisions rather than a dispute about dates of commencement or repeal.

Remedial Legislation

On March 20, 2024, Bill 25, *An Act Respecting An Act Respecting Child and Youth Well-Being* was introduced. Its preamble reads as follows:

WHEREAS An Act Respecting Child and Youth Well-Being, chapter 36 of the Acts of New Brunswick, 2023, received Royal Assent on December 13, 2023, without a commencement provision;

⁶¹ For example, see the approaches in *Reference re Criminal Law Amendment Act*, [1970] SCR 777, and *Canada Christian College and School of Graduate Theological Studies v Post-Secondary Education Quality Assessment Board*, 2023 ONCA 544.

⁶² Reference at para 1.

AND WHEREAS on February 12, 2024, The Court of Appeal of New Brunswick delivered its opinion in the Reference re *Family Services Act and the Child and Youth Well-Being Act*, 2024 NBCA 42 that the Legislature did not intend the coming into force of An Act Respecting Child and Youth Well-Being to occur before the coming into force of the Child and Youth Well-Being Act, which occurred on January 26, 2024;

AND WHEREAS it is desirable to enact a law confirming and ratifying the acts or things done in good faith under affected provisions between December 13, 2023 and January 25, 2024, both dates inclusive, and providing that no action, application or other proceeding lies or shall be instituted to question or in which is questioned the validity of the authority of a person who acted under those affected provisions;

The provisions that follow, among other things, provide legal certainty in respect of the validity of acts (and liabilities) related to the gap period. However, the bill does not insert a commencement clause in the 2023 legislation that was missing one. Rather, it chooses to extend the application of the would-have-been repealed provisions from the long-standing *Family Services Act* through to the date on which the new scheme (2022) was proclaimed. The Act does not say explicitly that these provisions operate despite the repeal legislation and the *Interpretation Act* as it applied to the repeal.

Conclusion

At the end of the day, submitting a reference question to untangle a legislative knot through judicial opinion was a strategic decision on the part of the Government of New Brunswick that achieved the government's desired result. From that realpolitik lens, it was preferable to recalling the legislature to adopt remedial legislation. The Court reached an important conclusion to solve the problem at hand, and public attention to the matter was likely lessened by a quick judicial punt rather than a recall of the legislature.

In the opinion of this author, however, the Court could have been more explicit about the limits of what it was doing and its basis for acting despite other potential ways to resolve the matter at hand. Specifically, it could have noted that there were other options to solve the problem without judicial intervention through a recall of the legislature. It could have suggested that the legislature be more attentive to the bills before it. It could have clarified how it viewed correcting an error versus bridging a gap and given a better indication of whether it would applied the same approach if the result otherwise were not the 'absurdity' it found in the present case. To that end, it remains to be seen if whether this opinion will open the door for more questioning of legislation or a wider scope for judicial intervention in the face of legislative gaps or errors, however they may arise and however characterized.

As noted above, remedial legislation to address potential legal issues from the gap period was enacted after the reference decision. Notably, it does not actually amend the law interpreted by the Court. That is, the 2023 legislation will continue to exist with a "read in"

or “implied” coming-into-force clause rather than an explicitly legislated one.⁶³ For its part, the “corrective” 2024 legislation contained no coming into force provision. As such, one presumes it came into force on royal assent under the *Interpretation Act* as the 2023 legislation would have, but for the reference case.

⁶³ The Court refers to “effectively reading in such a commencement provision” in the Reference at para 50 and also speaks to consequences if the court did not “find an implied coming into force provision” at para 47 so it is slightly unclear how best to characterize the coming-into-force of the 2023 legislation from the Court’s perspective.

Book Review: *Introduction to Legislative Drafting*

by Rassie Malherbe, Anton Meyer and Heinrich Muller (Juta Law, 2023)

Reviewed by Bilika H. Simamba¹

The authors state that “The purpose of the book is to provide students of legislative drafting, and others with more than a passing interest in the topic, with basic theoretical and practical knowledge and skills in respect of the drafting of legislation.”² They try to meet this aim through ten chapters; questions, problems, and exercises; and eight schedules. All in all, including the table of cases, table of statutes, bibliography, and index, the book is 240 pages long.

Chapter 1 Introduction

This chapter sets out the purpose of the book. It goes on to state the basics of legislative drafting: that legislative counsel transform policy into rules of law. It also reiterates that the Constitution is the supreme law of the land and should not be contravened in writing legislation or, where possible, in interpreting legislation. In about two pages, the authors set out a good summary of what the approach to interpretation should be, closing the segment with the words of the South African Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³ that

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or that undermines the apparent purpose of the document.

Undoubtedly, many a judge in the Commonwealth has uttered words in the same vein. The authors then mention, with a touch of informality, a matter of concern. They say:

The bottom line is that in every sphere of government numerous officials and private consultants, sometimes with limited knowledge and experience of legislative drafting, are expected to formulate legislation on matters that are becoming increasingly

¹ LLB, LLM (Zambia); LLM in Legislation (Ottawa, Canada); Advocate of the High Court for Zambia (retired); Attorney at Law, Cayman Islands (retired); Part-time Instructor, Graduate Diploma in Legislative Drafting, Athabasca University, Calgary, Alberta, Canada; Formerly Chief Parliamentary Draftsman, Zambia; formerly Senior Legislative Counsel, Cayman Islands.

² R. Malherbe, A. Meyer & H. Muller, *Introduction to Legislative Drafting* (Juta Law, 2023) at p 3.

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality*, [2012] 2 All SA 262 (SCA).

complicated. ... This results in a statute book varying in style and quality, making it even more difficult for those who must interpret and apply our laws, and the public who must observe those laws. The demand for legally qualified people and others with basic knowledge and skills in respect of legislative drafting has therefore grown rapidly and, in our view, it has become imperative for legislative drafting to form part of formal legal training.⁴

They go on to state that, “none of the legislatures in South Africa has a proper manual setting out uniform legislative drafting rules and guidelines.”⁵ In that regard, the authors give examples of consistencies even in what should be rubrics such as the enacting formula, where in some legislation it is rendered as “BE IT ENACTED by the Parliament of the Republic of South Africa” and in other legislation as “The Parliament of the Republic of South Africa enacts as follows”.

Chapter 2 Legislation as a Source of Law

This chapter discusses in general terms the words “law”, “legislation”, “Act” and “statute”. Later it refers to the common law. The authors refer to the *Constitution of the Republic of South Africa*,⁶ which sets out different classifications of Bills.⁷ These are: (a) ordinary Bills affecting the provinces; (b) ordinary Bills not affecting the provinces; (c) money Bills; and (d) constitutional amendments. In provincial legislatures, they refer to provincial Bills as well as national Bills referred by Parliament to the provinces for the conferral of mandates on their delegates in the National Council of Provinces. Then they list the types of legislation, examples of which are in the Schedules: (a) Acts of Parliament; (b) provincial Acts/laws; (c) municipal by-laws; (d) old provincial ordinances; (e) laws of former homelands; (f) proclamations by the President or a premier; (g) ministerial regulations; (h) regulations issued by members of provincial executives; (i) regulations issued by statutory bodies; (j) court rules. The chapter discusses other matters including the hierarchy of law and the separation of powers. The chapter contains a good summary of the structure of government.

Chapter 3 Law and Policy

This chapters discusses in greater detail how the sponsors of legislation initiate policy and how this policy is reduced to legislation. It also reminds us that this does not mean that legislative counsel cannot participate in refining that policy in the course of drafting or sometimes commenting on legislative proposals before drafting begins. The authors also note that “policy directives, policy determinations and policy guidelines” are not law. But they go on to say:

⁴ Malherbe et al. at pp 4-5.

⁵ Malherbe et al. at p 5.

⁶ *Constitution of the Republic of South Africa*, Act No. 108 of 1996 [Constitution].

⁷ Constitution at ss 73-77.

It does depend on the context, though. In some cases, they are indeed made and promulgated like delegated legislation and then they have the force of law. However, we advise legislative drafters to make sure they leave no uncertainty in their legislation in this regard and to spell out clearly whether such directives, determinations and guidelines are supposed to have the force of law.⁸

Even though South Africa has been a Commonwealth country, its law has been influenced by Roman-Dutch law. Therefore, one must be cautious in commenting on certain aspects of that system. In the broader Commonwealth, policy is certainly not law. However, it may have legal significance. For example, in the Privy Council case of *Attorney General of Hong Kong v Ng Yuen Shiu*,⁹ the Director of Immigration had given a public undertaking that illegal immigrants such as Ng would not be deported without first being interviewed. Lord Fraser of Fullerton, sitting in the Privy Council, found that even though there was no general right of an alien to have a hearing in accordance with the rules of natural justice, a legitimate expectation has been created in the mind of the immigrant. Accordingly, the deportation order was quashed. The Director's policy statement was not law but proved to be of legal consequence.

Chapter 4 The Work of a Legislative Drafter

This chapter describes the role of the legislative counsel and the drafting process as described by Garth Thornton,¹⁰ namely, understanding, analysis, design, composition and scrutiny. It also cites what it calls “equipment”: (a) statutes, with a warning that unofficial editions sometimes carry mistakes; (b) legal dictionaries; (c) court decisions; (d) a manual on procedures as well as style manuals, specific mention being made of material from the Australian Office of Parliamentary Counsel website, the Rose Commonwealth Legislative Drafting Manual (2017) and the Pan-African Parliament Legislative Drafting Guidelines for Persons Involved in the Drafting of Legislation in Africa (2008); (e) an up-to-date register of precedents; (f) materials from the Commonwealth and beyond, in which this journal was not forgotten.

The authors make many useful suggestions on the practical side of drafting. They say, for example, that “experience has shown that the real drafting and finalising of a Bill should preferably not take place in a group setting as this invariably leads to mistakes, oversights and delays.”¹¹

Curiously, they also say, “The drafter must also make sure that the Bill is consistent with the Constitution, with other applicable legal principles, and with the statute book, the common law and applicable international law.”¹² But surely a Bill sometimes seeks to amend

⁸ Malherbe et al. at p 32.

⁹ [1983] 2 All ER 346.

¹⁰ H. Xanthaki, ed., *Thornton's Legislative Drafting*, 6th ed (Bloomsbury, 2022) at p 155 (as cited in Masher et al.).

¹¹ Malherbe et al. at p 50.

¹² Malherbe et al. at p 36.

applicable principles and the common law, while, in so doing, ensuring that there are no inconsistencies with related statutes.

The chapter acknowledges that, “traditionally”, legislative counsel become involved only after the executive has adopted the legislative proposal but also acknowledge again that legislative counsel can comment at the stage of developing the proposals. However, the authors go on to say that:

In practice these days, departmental legislative drafters are routinely involved in the development of policy, as well as the preparation of draft legislation, even before the executive takes a formal decision on proposed legislation ... The important role played by departmental drafters nowadays is illustrated by the fact that their drafts are often enacted into law with only minor changes.¹³

This is unusual in the Commonwealth. Whereas some jurisdictions have departmental solicitors who draft subordinate legislation, Acts of Parliament are generally drafted by Parliamentary Counsel. Sometimes, complex subordinate legislation is also drafted by Counsel.

Chapter 5 Principles of Legislative Drafting

In this chapter, the authors discuss, in general terms with examples, some of the well-known matters relating to the consideration of legislative proposals: (a) legislative restraint; (b) accessibility; (c) compatibility and uniformity; (d) simplicity; (e) accuracy; (f) practicability; and (g) legal certainty and justice. Regarding accessibility, they refer to the words of the Constitutional Court in *Affordable Medicines Trust v Minister of Health*,¹⁴ where it said, “The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.”

Chapter 6 Drafting a Law

Chapter 6 goes into some of the basics of drafting legislation, such as the need for clarity and plain language, the legislative sentence (mentioning and illustrating George Coode’s analysis), gender-neutral drafting, paragraphing, dangling modifiers, archaic words, problematic words, and the like.

On gender-neutral drafting, the authors note that in South Africa section 6 of the *Interpretation Act*¹⁵ still reflects the traditional convenience that “words importing the masculine gender includes females”. But they go on to say that “this is no longer acceptable.”¹⁶ They then give several useful examples of how certain traditional pieces of writing can be made gender-neutral. It is worth noting that South Africa is only one of the jurisdictions that retain this archaic position. Many such pieces of legislation in the

¹³ Malherbe et al. at p 37.

¹⁴ (2006) (3) SA 247 (CC) at para 108.

¹⁵ Act No. 33 of 1957.

¹⁶ Malherbe et al. at p 74.

Commonwealth now state not only that the masculine includes the feminine but also that the feminine includes the masculine. Most that I have read mention the masculine first. Some jurisdictions are, however adopting more modern rules of interpretation regarding gender expression. For example, section 28(2) of the British Columbia *Interpretation Act* provides that “Gender specific terms include all genders and include corporations.” The New Zealand *Legislation Act 2019* provides in section 16(1) that “[w]ords denoting a gender include every other gender.”

Chapter 7 The Structure of a Law

The authors describe what they call components of a law in South Africa, the ones in brackets being “optional”: long title; (preamble); enacting provision; (table of contents); definitions; (application of Act); (purpose of Act); main or substantive provisions; miscellaneous—offences, penalties, delegations, regulations etc.; (transitional provisions); repeals; short title; (schedules). It is interesting that the short title still goes at the end.

Chapter 8 Amendments

This chapter describes the textual amendments and indirect amendments. It adds the usual cautions:

- (a) The whole of the principal Act as well as other related laws should be studied and kept in mind throughout so that the amendments fit into the principal Act and into the wider context of other related laws.
- (b) We should ensure that we use the correct text of the principal Act, in other words as it was published in the Gazette. If the Act was amended, those amendments, as they were published in the Gazette, should be used. As mentioned, the consolidated versions available online are not always completely accurate.¹⁷

Chapter 9 Delegated Legislation

In this chapter, the authors discuss the purpose of delegated legislation, the legal requirements with which delegated legislation should comply and some guidelines for the drafting of delegated legislation. They conclude it with few comments on the oversight function of legislatures in respect of delegated legislation.¹⁸ It is interesting that in discussing oversight, they do not use the terms more commonly used in the Commonwealth, namely, Negative Resolution and Affirmative Resolution, through the concepts do exist in South Africa.

The authors mention a curious provision in relation to once province:

¹⁷ Malherbe et al. at p 124.

¹⁸ Malherbe et al. at p 131.

In the province of Gauteng, the provincial legislature adopted an Act, the Scrutiny of Subordinate Legislation Act, 2008 (amended in 2011), that requires submission to the legislature of all draft regulations to be made by the executive for scrutiny by a standing committee before they are formally made and promulgated. If the committee finds the regulations wanting in terms of certain criteria, and the finding is endorsed by the legislature, the regulations may not be made unless they are amended in accordance with the committee's findings. This is quite a far-reaching and unique form of scrutiny that has not yet found traction in other provinces or the national Parliament.¹⁹

Chapter 10 Legislative Quality

This chapter considers what they call “legislative quality” and reiterates some of the matters that authorities must consider before introducing legislation. Their full checklist, the details of which will be familiar to Legislative Counsel, is as follows:²⁰

1. Has the problem been correctly identified?
2. Is government action justified?
3. Is regulation (legislation) the best form of government action to solve the problem or are there other means of attaining the same objectives?
4. Is there a legal basis for the legislation?
5. What is the appropriate sphere of government for this action?
6. Does the legislation fit well into the existing legal system?
7. Is the legislation consistent with the Constitution?
8. Does the legislation achieve its purpose? Is it effective?
9. Do the benefits of the legislation justify the costs?
10. Is the distribution of effects across society transparent and equitable?
11. Is the legislation clear, consistent, comprehensible and accessible?
12. Have all interested parties had the opportunity to present their views?
13. How will compliance with the legislation be achieved?
14. What consideration has been given to the review of the legislation at a later date?
15. Does the legislation promote legal certainty as well as justice?

The authors conclude with the question as to who is responsible for legislative quality. In response to this they say:

¹⁹ Malherbe et al. at p 138.

²⁰ Malherbe et al at pp 141, 142.

It is our contention that all stakeholders are responsible (prior to and after the fact) to ensure that only quality legislation reaches and remains on our statute book. These would include executive decision makers; the members and committees of the relevant legislative institutions and their staff; ... departments and administrations in all spheres of government; the state law advisers and parliamentary law advisers; the public (specifically organisations and other stakeholders active in the branch of the law concerned); the courts, legal experts and lawyers; and the South African Law Reform Commission. We all carry some measure of responsibility for the quality of the statute book!

This is of course correct. And it is important to emphasize that legislative quality, properly conceived, refers to how well-conceptualized the legislation is as well as its editorial quality. Legislative Counsel of course bear great responsibility to ensure that the legislation is well-conceptualized (based on the policy behind the Bill) and in good editorial shape. What is more, it is important for all officials involved in developing a piece of legislation to understand that, if even a comma goes askew, to the extent that this should generally fall within the competence of all involved in the legislation, they all must take responsibility for it.

Overall Assessment

Here and there the book uses expressions that are perhaps in greater use in South Africa than in the rest of the Commonwealth, though they can be understood by that audience also. The book has an informal and yet effective style in sharing the skills and knowledge of the authors, perhaps intentionally done to avoid the sometimes-stilted discussion of legislative drafting matters. The authors have also touched on some issues that need reform or improvement in the South African legislative systems. They have pointed out the lack of uniformity in how laws are rendered, even in the more formal aspects such as the enactment clauses and citation clauses. They have also touched on the need for gender-neutrality and even given examples of how this might be done.

Overall, Malherbe, Meyer and Muller have delivered on the promise to write a book for students of legislative drafting, and others with more than a passing interest in the topic. I would recommend the book to all legislators at all levels of government, and their advisers, whether such legislators and advisers be lawyers or non-lawyers. This book can also be used as a resource to train not just budding legislative counsel but anyone who is involved in the legislative process.

Book Review: *Legislative Drafting for the EU*

by Helen Xanthaki (Edward Elgar Publishing, 2024)

Reviewed by Lucy Marsh-Smith¹

2024 saw the publication of Professor Xanthaki's critique of EU legislation. Its subtitle is "Transposition Techniques as a Roadmap for Better Legislation and a Sustainable EU." As the current editor of Thornton's *Legislative Drafting* and with wide experience of considering drafting from an academic viewpoint, the author draws on her knowledge of best practice in analysing and drafting legislation to call to account the standards of preparation of EU legislation. Much of the book examines EU legislation in the context of how it is transposed into the law of Member States. Transposition is the process by which EU Member States implement EU legislation so it forms part of the law of the country concerned. The book goes on to consider the defects in EU legislation itself, recognizing that remedying those defects is key to better legislation at both the national and EU levels.

This is a detailed work that runs to some 368 pages. It is divided into 12 chapters, as follows.

Chapter 1 — Transposition techniques for EU legislative reform: serving EU longevity and sustainability

This chapter considers EU legislation as a tool for regulation, to achieve the desired regulatory results through communication of rights and obligations to EU citizens. The chapter introduces "Better Regulation", the agenda to ensure evidence-based transparent EU law-making. Harnessing its methodology for "better legislation" is seen as a path to "Legislative Effectiveness", the ultimate measure of quality in legislation, achieved by clarity, precision and unambiguity.

Chapters 2 to 6 then analyse legislative quality and EU practices using Thornton's five stages of legislative drafting, namely 1. understanding the policy proposal, 2. analysing the policy proposal, 3. designing the draft law, 4. composing the draft law and 5. verifying it internally and externally.

Chapter 2 — Understanding the transposition task: the intricacies of transposition

This chapter proclaims the importance of national implementing measures, and thus national drafters and law makers, to the success of the EU regulatory package. The ways in which they give national effect to the objectives and rules of EU instruments can enhance effectiveness if it results in citizen engagement. The chapter describes the difficulties of drafting transposition legislation, considering the task in the context of Thornton's stage 1. The main challenges of current transposition practices at the stage of understanding the policy are stated to be the low visibility of the EU's concrete regulatory goals and the need

¹ Principal Legislative Drafter, Legislative Drafting Office, Jersey. Views expressed are the reviewer's own.

to rely on a final legislative text as drafting instructions, which encourages the copying out of that text, rather than being able to work creatively from the regulatory aims of the original. The author advocates fine-tuning and expansion of the introductory report of draft EU texts and any transposition guidelines so that they can serve as complete drafting instructions. She also advocates keeping EU citizens aware of the proposals and the importance of their participation, along with and via their elected representatives, in the production of legislation as a regulatory tool.

Chapter 3 – Analysing the transposition task

Using Thornton's stage 2, Xanthaki observes the need to analyse both EU and national laws and the interplay and interconnection between them. One of the main challenges is that national legislative drafters are in the dark as to whether they are meeting EU requirements. The transposition challenge would greatly benefit from a submission of the Member State's legislative plan to the European Commission for comments. Though this might increase bureaucracy and delay, she argues it would prevent infringement proceedings. These are proceedings that can be brought before the European Court of Justice by the European Commission or a Member State if a Member State has not fulfilled its obligations under EU law, in this context by failing properly to implement an EU requirement into national law. It might also encourage starting the transposition process earlier. There also needs to be a concrete methodology and structure for transposition tools so national drafters have the necessary data. Participation of citizens would aid understanding of the stance of user groups.

Chapter 4 – Designing the transposition law

Turning to Thornton's stage 3, the author stresses the importance of design in the drafting process and bemoans the lack of focus on the design of the transposing text and the blind copying of the design of the EU text with its archaic drafting style. She advocates legislative expression at both the national and EU level that conveys the regulatory message to the user. The national structure, guided by the principle of effectiveness as discussed above, may also serve EU drafters if it contributes to direct communication between the EU and its citizens.

Chapter 5 – Composing and developing the transposition law

Moving on to stage 4 the composition stage, Professor Xanthaki stresses how choices of language can inform clarity, precision and unambiguity and thus promote and contribute to effectiveness. But the copying out verbatim of EU text, with its own legislative expression, creates issues of unpredictability and interpretation that militate against effectiveness. The correlation between EU and national terms is not always evident. She examines the use of the term "victim" across Member States to illustrate the point and concludes it is far better to create a new national-focused text rather than merely adopting the EU definition. She finds that at a national level there is a common desire for plain language leading to the agreed desired regulatory results that it would be desirable to adopt at the EU level. A shift of focus

from a punitive post-legislation review of national transposition legislation to a pre-emptive pre-legislative joint co-legislation review of national transposition plans could lead to creative composition of transposition texts. Taking transposition into account when selecting terms in the EU text would do much to avoid ambiguity.

Chapter 6 – Verifying the transposition law and completing the transposition task

This chapter, referring to stage 5 the verification stage, discusses internal and external scrutiny of drafts and applies it to transposition legislation. The problem is that not all Member States ascribe to user testing so there is not a full degree of external verification to assure drafters that their text has conveyed the correct regulatory message. Moreover, transposition drafters must satisfy both national and EU aims and styles, coupled with the lack of freedom inherent in working from an existing text, to be used as instructions rather than a model law. A correct approach of identifying the policy aims and early detection of regulatory and legislative errors through verification would mitigate these problems. Finally, the move of the Commission to pre- (rather than post-) legislative transposition monitoring along with the holding of meetings should ensure that the EU regulators' aims are adequately and accurately expressed in the national texts.

Chapter 7 – Legislating for EU accession and approximation

Chapter 7 considers how countries applying for EU membership might want to prepare for accession by drafting approximation legislation. This involves a country voluntarily harmonizing its legislation to align with EU rules, which could be a step towards potential EU membership. Though the same concept of effectiveness applies, it is a lighter drafting exercise than transposition and without the same consequences. Here Xanthaki considers the task, again using Thornton's methodology, and concludes that the resulting text must comply with the EU's vision for Better Regulation and better legislation. Understanding the concept of effectiveness and drafting an effective text is perhaps the greatest challenge for approximating drafters.

Chapter 8 – Drafting for exit from the EU

This chapter aims to introduce a sound methodology for exit from the EU. Exit inevitably creates a complex task for drafters in both the exiting state and the EU. Xanthaki outlines three options for exit, namely complete disengagement, the maintenance of some relationship or a soft exit with some continued participation. She considers the tasks for each from a drafting point of view. The first option creates a mammoth task for drafters in the need to repeal all EU legislation and replace what is needed. The second option, as informed by Brexit, enables a more staged approach. The third allows for an element of pick and choose.

Chapters 9 and 10 aim to show how the five stages of the drafting task can be used for a new transposition-led drafting style for EU legislation, first by taking a recent Regulation as an example and then a Directive. They were chosen for their different transposition

requirements and for being of particular relevance to EU citizens. The aim was to dissect the legislation, identify its strengths and weaknesses and to render it better communicated to the user.

Chapter 9 – A transposition-led drafting style for Regulations

The Regulation chosen for this chapter is *Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 Pandemic*. The text of the Regulation is set out in one column with the author's comments in a second column and this is followed by a redrafted version. The author concludes that the exercise showcased the possibilities open to the regulators of a new drafting philosophy with a leading role for users. This supports a change of drafting style with a shorter title, the culling of recitals and definitions and stating objectives, among the 12 recommendations.

Chapter 10 - A transposition-led drafting style for Directives

The exercise here is more radical in its restructure, to complete the application of lessons learnt for EU drafting in Chapters 2-6. The Directive concerned is *Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms*. The analysis advocates a user-centered drafting style. The focus is on compiling a list of tasks to promote understanding of what needs to be done and by whom, which the author thinks could reduce time and resources. The text of the Directive is again reproduced with comments, then re-written in a new structure. Though the redraft is described as “superficial,” the results were “breathtaking”. It was feasible to distinguish between regulatory messages for EU citizens, Member States and other readers. The author concludes by reviewing the success of the redraft in terms of efficacy and effectiveness. Unexpectedly the exercise identified 437 obligations on Member States, highlighting the burden of the transposition task and explaining the tendency merely to copy out Directives.

Chapter 11 – How do I get there? A methodology for the reform of EU legislation: Better Regulation applied

This chapter is about how to get the EU to reform its drafting style. It introduces a methodology and roadmap for a better legislation strategy. There is a lack of agreed definition of effectiveness when applied to legislation, which makes the task very difficult. Despite its regulatory reforms, the EU has not kept up with advances in legislative practices in some Member States. The author suggests using Better Regulation and placing the new strategy under the DECIDE test. This invites the identification of the key characteristics and type of the proposed initiative and its scope and objectives. The strategy has added value for EU citizens and companies. The aim is to deliver policy objectives in the simplest, most

efficient and effective way possible, to avoid over-regulation and unnecessary burdens and to facilitate transposition and practical application. Finally, Better Regulation has tools that can be applied, namely evaluation, impact assessment, public consultation and an implementation plan. The hope is that using EU legislation as a tool for direct regulatory communication with EU citizens can add to effectiveness and trust.

Chapter 12 – Conclusions - legislative reform for sustainability and longevity of the EU

The book concludes by stating that the application of international standards for legislative drafting in the implementation of EU legislation identifies a number of weaknesses in existing practices. Based on the redrafting exercises in Chapters 9 and 10, it repeats the 12 recommendations for changing the way Regulations are drafted and sets out seven recommendations for changes in Directives. The final note reminds us of the methodology set out in the preceding chapter and stresses again the importance of citizen engagement as contributing to more effective legislation.

This book is a detailed work that hammers home its message across each of the chapters. It is written from an academic stance but attempts to show practical application in its redrafting as an illustration of how EU legislation could be made more user-friendly. It cannot be said to be light reading, and I was surprised to find quite a few typos, but it is a worthy attempt to tackle the issue that EU legislation is often impenetrable, to the service of no-one.
