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CALC Council

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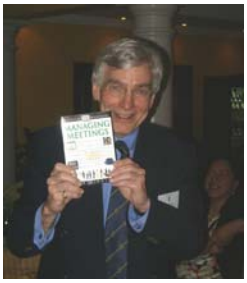

Welcome to the first issue of The Loophole for 2008. This issue contains 4 of the papers presented at the CALC conference held in Nairobi, Kenya in September 2007. The remaining papers will be printed in the next issue of The Loophole scheduled for later this year. This issue also contains a lively riposte from Mark Adler to a provocative article written by Francis Bennion under the title Confusion over Plain Language Law.

The published articles from the Kenya conference are testimony to the quality of the business sessions of that conference. The laughter and general noise level (not to mention singing) heard at the social occasions were testimony to the success of the conference as a network-building vehicle for legislative drafters from all parts of the CALC world.

Included among the articles in this issue is an insightful piece by the Rt. Hon. Lady Justice Arden, DBE on the judicial approach to statutory interpretation together with some reflections on the nature of the rule of law. There are papers by David Hull and Stephen Laws on the role of legislative counsel. David's paper highlights the particular difficulties faced by drafters in small jurisdictions. Stephen's paper, apart from dealing with the subject at hand, contains a discussion on the distinction between true translation and transliteration. Working in a bilingual jurisdiction, I found that aspect particularly interesting. Deon Rudman's article on delegation of legislative powers not only updates us on the South African position but causes us to think again about the appropriateness of different kinds of empowering provisions and about Henry VIII clauses.

I hope that you enjoy reading this issue and that it inspires you to come to Hong Kong in April 2009 for the next CALC conference.

Finally, special thanks are due to Duncan Berry, CALC's tireless Secretary, for putting this issue together.

Eamonn Moran, President

Job opportunity

The American Bar Association (ABA) is seeking a volunteer legislative drafting specialist for a two-stage project for the Kingdom of Bahrain. The initial stage will be held from 9 to 11 September 2008 to assess the needs for new policies and training. This will be followed in due course by a workshop or other form of training.

Although this is a voluntary position the ABA will pay travel costs and a daily rate. The ABA is looking for someone with at least 5 years' relevant experience (including international experience), a high level of energy and initiative, strong interpersonal skills, and demonstrated legal expertise.

For more information about the position or to indicate interest, please contact Kathy McEnany, Program Officer, ABA/Rule of Law Initiative, Middle East and North Africa Division, Washington DC, USA, at kmcenany@staff.abanet.org. Telephone: 1-202-662-1958; Fax: 1-202-662-1597.

The impact of judicial interpretation on legislative drafting[1]

The Rt. Hon. Lady Justice Mary Arden DBE[2]

Introduction

I am greatly honoured to be asked to give this keynote address to this biennial conference of the Commonwealth Association of Legislative Counsel. I consider it to be very important in a modern democracy that laws should be drafted in conformity with the rule of law. Indeed, the rule of law may cease to exist if laws are not properly drafted. Hence I attach great importance to the work of legislative drafters.

So far as the title to this talk is concerned, I suggested to your chairman that he should choose the title and so the title you have is the title he chose. This particular title has given me considerable insight into what interests you, assuming the chairman has correctly understood what you would like me to talk about. It seems to me that you are interested in a form of reverse engineering. That is the process which occurs when you take a car or a dishwasher to pieces to see how the final product is made up, and how it works. So, too, you, through your chairman, have expressed an interest in judicial interpretation and want me to take that apart so that you can see what impact it has on the work which you do when you are drafting statutes.

I should say straight away that judges approach the task of interpreting statutes in a variety of ways. There is no single technique which they use or manual which they have. However, there are a number of basic themes. What I propose to do is to identify some of those themes and then hopefully to draw some points together about the sort of things which I at least find helpful or unhelpful.

The general approach to statutory interpretation

Statutes are the means by which the legislature imposes its will on the citizen. Statutory interpretation therefore has constitutional implications. Statute law is increasingly important in the United Kingdom because of the sheer volume of statute law enacted each year by Parliament and also by the devolved Parliaments of the United Kingdom, that is the Scottish Parliament, the Northern Ireland Assembly and the Welsh Assembly. Some legislation is enacted to fulfil international obligations, such as the obligation to implement Community instruments that consist of legislative

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1 Keynote address presented at the Commonwealth Association of Legislative Counsel conference, Nairobi, Kenya, September 2007.

2 Member of the Court of Appeal of England and Wales.

measures of various kinds adopted by the European Community and requiring implementation in the member states.

Statutory interpretation is the prerogative of the courts, including tribunals, and the courts alone. We do not, for instance, have a principle such as exists in the United States of America whereby, in a case involving a challenge to executive action carried out on the basis of the Executive's view as to the meaning of an ambiguous statute, the court does not ask whether the interpretation is correct, but simply whether the administrative agency's interpretation is a permissible one. In most countries, statutory interpretation is the prerogative of the courts, but there are some jurisdictions, notably Hong Kong, where the final say is given to the legislative body. Thus, even where the Court of Final Appeal of Hong Kong has given a judgment on the meaning of the Basic Law the Standing Committee of the National People's Congress in Beijing can state its view as to the meaning of the Basic Law, and that view is binding. Happily, that has only happened on rare occasions.

The doctrine of precedent applies to decisions interpreting statutes and accordingly the decisions of the higher courts bind the lower courts within the same jurisdiction. There are three separate jurisdictions in the United Kingdom. The Court of Appeal and lower courts in England and Wales would, in the absence of some compelling reason, follow decisions of the Inner House of the Court of Session in Scotland and of the Court of Appeal of Northern Ireland if the statute is one that applies throughout the United Kingdom.

In the United Kingdom, highly trained legislative drafters draft statutes and stylistically legislation tends to be detailed. Nevertheless, there are many problems of statutory interpretation. This is inevitable because it would be humanly impossible for the drafter or the legislator to draft legislation that would cover every situation that might arise. Sometimes legislation is passed in a hurry or an amendment is inserted at a late stage that has not been fully considered.

The principles of statutory interpretation are not codified. They are governed by the common law and are therefore capable of endogenous development by the courts to meet new technical problems or social needs. Since the principles of interpretation are governed by the common law, it might be thought that statutes mean what judges say they mean, rather than what Parliament may have intended. But that is not theoretically so: in general, the court's function is to ascertain the intention of Parliament and that is done from the language that Parliament has used. Thus we can say that the basic model for statutory interpretation is an "Agency Model". The essential feature of this model is that the judge sets out to interpret what is written in front of him, rather than to think about constitutional issues. In doing this he is fulfilling as faithfully as he can the will of the democratically elected Parliament.

It follows naturally from this that judges cannot rewrite statutes. Moreover, they must always act within judicial constraints. But, in practice, there are situations where it is not clear what Parliament would have intended if it had thought about the situation that has emerged and presents itself in the case before the court. Parliament may have intended one thing but the language which it has used may not bear that meaning. The court has to find the meaning of the statute from the language used and the indications given in the statute read as a whole. This means that it is possible that its interpretation will turn out not to have been what Parliament intended.

In principle, the same method applies to all kinds of legislation, whatever the subject matter. In determining the intention of Parliament from the language used, the main rules which the court applies are that the statute must be read as a whole and that all the words must be given a meaning. There are other rules such as the limited class, or "eiusdem generis", rule. Under this rule, where there are a number of specific terms followed by a general word, the general word is to be interpreted as limited to the same class of thing as the earlier specific terms. Since the role of the courts is to interpret legislation, and not to rewrite it, the courts cannot cure a gap in a legislative scheme. However, by careful interpretation they may be able to prevent the gap from arising in the first place.

After a statute is passed, changes often occur, for example, changes in social conditions or technological developments. Exceptionally, a statute is limited to a state of affairs existing at a particular point in time, but more generally it is silent about its effect in changed circumstances. As already explained, the courts cannot fill gaps in legislation, and so they have to determine whether the existing statute applies to the changed state of affairs. The legislation may express a clear purpose that can only be fulfilled if it is applied to the new state of affairs. The House of Lords held that this was the case where the statute provided for a process of statutory licensing for in vitro fertilisation of human embryos and a new method of creating embryos outside the human body was discovered (*R (Quintavalle) v Health Secretary* [2003] 2 AC 687). In other cases, it may be that the legislation refers to a concept, which is sufficiently wide to embrace changes in circumstances. This is the case, for instance, where companies legislation requires company accounts to show "a true and fair view". The content of the concept of a true and fair view may change over the course of time but the concept itself is unaltered.

In some jurisdictions, the courts, when interpreting a statute, can take into account what was said in Parliament when the Bill was considered. In England and Wales, the use of legislative history as an aid to the interpretation of the statute was not permitted prior to 1993. It can now be used as an aid to interpretation if the statute is ambiguous and if a government minister, or other promoter of the Bill, made a statement in Parliament dealing clearly with the point of dispute (*Pepper v Hart* [1993] AC 593). But this is a very limited exception to the general rule excluding legislative history. The court cannot, for example, use legislative history to show that a particular change in the law was considered and rejected in the course of pre-legislative scrutiny.

Statutes are enacted on the basis that principles of the general law apply unless Parliament has excluded them expressly or by implication. The principles in question may be principles of public law or of private law. An example of this is where statute creates a public body and gives it powers. It will be presumed by the courts that the public body will, in the exercise of its powers, be subject to the supervisory jurisdiction of the courts on the principles of administrative law developed by the courts. These general principles of law do not need to be set out in the statute and in general it is better not to set them out. If they are set out, that may throw doubt on their application in statutes where they are not set out. Moreover, developments in the case law may not apply. If the principles go beyond the principles permitted by the courts, a citizen may unintentionally obtain additional remedies over and above those to which the citizen would be entitled in similar situations under public law.

The most important of the general principles of law is undoubtedly the rule of law itself. The rule of law has never been comprehensively defined. For that reason, when the office of Lord Chancellor was reformed in the United Kingdom by the *Constitutional Reform Act 2005*, it was thought desirable to state that the reforms to his office did not affect his function to uphold the rule of law. Accordingly, s 1 of that Act provides:

"This Act does not adversely affect—

- the existing constitutional principle of the rule of law, or
- the Lord Chancellor's existing constitutional role in relation to that principle."

The rule of law is absolutely fundamental. It is like a tree which is perpetually developing and has many branches. The fundamental principle of the rule of law is that there is a state of affairs in which law rules and in which people are equally subjected to the law. The branches of the rule of law include—

- access to justice,
- the principle of limited government,
- the principle of separation of powers,
- the principle that the law must achieve a certain quality, and
- the principle that the law must guarantee certain basic rights.

As to the principle of limited government, Lord Phillips, Lord Chief Justice of England and Wales, in his keynote address to the 2007 Commonwealth Law Conference went so far as to say that the rule of law would not fully prevail unless judges could review the legitimacy of executive action.

The Senior Law Lord of the United Kingdom, Lord Bingham of Cornhill, recently gave an important lecture in which he set out a number of the features of the rule of law. This lecture is now published in the Cambridge Law Journal ([2007] CLJ 67), and it is well worth reading in full. He said that the core of the existing principle of the rule of law is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. He said that it was important to understand the implications of the rule of law, and he conveniently broke these down into eight sub rules, which he did not intend to be exclusive. Those sub rules were that:

- the law must be accessible and, so far as possible, intelligible, clear and practicable;
- questions of legal right and liability should ordinarily be resolved by the application of the law, not by the exercise of discretion;
- the laws of the land should apply equally to all save to the extent that objective differences justified differentiation;
- the law must afford adequate protection of fundamental human rights;
- means must be provided for resolving without prohibitive cost or inordinate delay bona fide disputes which the courts themselves are able to resolve;

- ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers;
- adjudicative procedures provided by the state should be fair, and
- the existing principle of the rule of law requires compliance by the state with its obligations in international law.

Stephen Laws, the distinguished First Parliamentary Counsel of the United Kingdom, recently reminded me about the work of the great Professor Lon Fuller. In his book, *The Morality of Law*, Professor Fuller identified eight elements of law as necessary for a society aspiring to institute the rule of law.

The eight elements stated by Professor Fuller were:

- Laws must exist and be obeyed by all, including government officials.
- Laws must be published.
- Laws must be prospective in nature, so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.
- Laws should be written with reasonable clarity to avoid unfair enforcement.
- Laws must avoid contradictions.
- Laws must not command the impossible.
- Law must stay constant throughout time to allow the formalisation of the rules; however, the law must allow the timely revision when the underlying social and political circumstances have changed.
- Official action should be consistent with the declared rule.

Many of these elements can be applied directly to statute law, for instance, the elements that the law must be prospective in nature and that they must avoid contradictions and not command the impossible.

Professor Fuller wrote that an attempt to create a legal system might miscarry in at least one of eight ways. He concluded that a total failure in any one of the eight ways that he identified would result in something that could not properly be called a legal system at all "except perhaps in the Pickwickian sense in which a void contact can still to be said to be one kind of contract."

The principle of the rule of law is one of the general principles of law against which legislation is drafted. The rule of law is very relevant to the task of legislative counsel and I would suggest that legislative counsel would do well to have principles identified by Lord Bingham and Professor Fuller well in mind. I am indebted to Stephen Laws for pointing out to me the relevance of the principles identified by Professor Fuller to the work of Parliamentary Counsel.

I would indeed seek to go further than this. Legislative counsel seem to me to be the gatekeeper in many situations. They have, of course, to act on the instructions of the promoters of the legislation and to draft the legislation as they are instructed but they are also able to advise and should do so where it seems that legislative proposals would offend against general principles of law, including the rule of law itself. It is one of the advantages of having an independent profession of legislative drafters that they should exercise independent judgment on a matter as important as the rule of law. It is an important constitutional safeguard for the citizen. Unlike the courts, drafters will see all or nearly all of the legislation placed before Parliament.

Professor Fuller's rules may have practical implications for the work of the courts as well. I would like to give the example of a case in which I sat called *Re FP (Iran) v SSHD* [2007] EWCA Civ13. This case concerned the power of the Lord Chancellor to make rules for asylum appeals. The statutory power, provided that, in making these rules, the Lord Chancellor should "aim to secure… that the rules are designed to ensure the proceedings before the tribunal are handled as fairly, quickly and efficiently as possible….". The power also enabled the Lord Chancellor to make a rule requiring a tribunal to hear an appeal in the absence of the parties.

The Lord Chancellor made a rule requiring the tribunal to hear an appeal in the absence of a party or his representative if it was satisfied that the party or his representative had been given notice of the date, time and place of the hearing and had given no satisfactory explanation for his absence. This rule was in contrast to the rule which applies to normal civil proceedings. This enables the court to proceed to a trial in the absence of a party, but provides that the party may apply for the judgment to be set aside. The court may grant that application if the applicant acted promptly, has a good reason for not attending the trial and has a real prospect of success. There was no equivalent in the asylum rules. I held that the relevant rules gave the party or his representative the right to give a satisfactory explanation for his absence. If, however, the reason for his absence was that he was not aware of the notice of hearing, he would be unable to give any explanation for his absence and thus could never satisfy that part of the rule, even though the rule had purported to give them that opportunity. In the cases before us, the parties had failed to appear because they had changed their addresses and asked their solicitors to give notice of change of address to the tribunal which those solicitors had failed to do. The rule appeared to apply when the party had not become aware of notice of hearing. The rule purported to give the party the right to put forward an explanation for that failure and to show that there was a satisfactory explanation. A party might be able to give a satisfactory explanation for his absence, for example, where he had had an accident and been in hospital when the notice was sent and had not seen it until too late.

The Secretary of State argued that the applicants' remedy was to apply for judicial review of the tribunal's decision. However, judicial review is not available where there is a mistake of fact which is the responsibility of the applicant or his legal representatives or if the mistake of fact was contentious. Yet a party might be able to give a satisfactory explanation for his absence, such as where he had had an accident and been in hospital when the notice was sent and had not seen it until too late.

In the circumstances, the relevant rule removed the right of a party to provide a satisfactory explanation for his absence by providing that the tribunal must proceed in his absence even if he did

not know he had to put forward such an explanation. I held that the situation in which a party was given a right and it was then taken away before he had a chance to exercise it did not fulfil the basic requirements of the rule of law as identified by Professor Fuller. The rule was accordingly held to be *ultra vires* to the Lord Chancellor's rule-making power. The Lord Chancellor accepted this decision and altered the rules.

I now turn to the relationship between statutes and obligations in international law. International treaties are not enforceable in our domestic law unless they are approved by Parliament. But, where an international treaty is adopted into English law, an important statutory presumption arises, which is the springboard for a more dynamic approach to statutory interpretation than the Agency Model, which I have hitherto discussed. It is presumed by the courts that, where Parliament has made an international treaty part of our domestic law, then, when it enacts subsequent legislation, it intends that legislation to comply with its international obligations. This is a very important presumption in relation to Community law, and I take it that this presumption may also be relevant when courts are considering the obligations of their Parliaments to fulfil obligations of international organisations such as the South African Development Community, and the East African Community, the Common Market of Eastern and South Africa, the Caribbean Community and Common Market.

Dynamic approach applying to the interpretation of Convention rights

In my speech to the CALC conference in London in 2005 (which has now been published in *The Loophole*), I explained how a dynamic approach applied to the interpretation of legislation when a question arises as to whether the legislation complied with human rights. The legislative framework is contained in the Human Rights Act 1998. This imposes a specific mandatory obligation on the courts to interpret legislation in conformity with the rights guaranteed by the European Convention on Human Rights, to which I will refer simply as the Convention. This approach is built on the presumption that domestic law must be interpreted in accordance with international treaty obligations adopted by Parliament.

Accordingly, s 3(1) of the Human Rights Act 1998 provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

I explained in my keynote address in 2005 how the English courts had been given powers to make declarations of incompatibility in respect of legislation that could not be interpreted so as to be compatible with Convention rights. But any such declaration does not affect the result in the particular proceedings or constitute any precedent on which other parties can rely. It simply acts as a signal to Parliament and also to the government that it should consider introducing some measure to amend the enactment in question. The scheme of the *Human Rights Act 1998* was intended to preserve Parliamentary sovereignty in that regard.

What does this mean in practice? Significantly, in relation to interpretation of legislation under the *Human Rights Act 1998* we move from an Agency Model to the "Dynamic Model". The judge is not simply looking at the wording and trying to apply it. He is looking at the wording critically and considering whether it complies with the Convention. This approach works on the basis that

Parliament intended that statutes should have the effect of operating in conformity with human rights unless the contrary conclusion could not be achieved by interpretation. But, in truth, it is no longer a matter of looking at Parliamentary intention. This is highlighted by the fact that the new approach applies to legislation whenever passed. The court is acting as the guardian of human rights and constitutional rights. Its role is a dynamic one, and hence I call the model in this context the Dynamic Model.

Just how dynamic is this model? After a little trial and error on the part of the House of Lords, if I may respectfully say so, there was an important case called *Ghaidan v Godin Mendoza* [2004] 2 AC 557. This case concerned the question whether statutory rights of succession in respect of a tenancy were transmitted to a person who lived with a deceased original tenant of the same sex. The relevant condition in the statute was that the person should have lived with the deceased original tenant "as his or her wife or husband". If the legislation did not benefit same sex couples, it would discriminate against them in violation of article 14 of the Convention read with article 8 of the Convention. The House of Lords held that the statute in question applied to the survivor of a same-sex relationship as much as it did to a surviving spouse. The court gave important guidance as to the limits of section3 of the Human Rights Act 1998. I will merely refer to the speech of Lord Nicholls.

Lord Nicholls held that the effect of section 3 was that the court might be required to depart from the unambiguous meaning of the statute. The question of difficulty was how far the court should go. He held that the answer to this question did not depend upon the actual wording used by Parliament. He continued:

> "32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention- compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables the language to be interpreted restrictively or expansively, but section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention compliant. In other words, the intention of parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.

Parliament, however, cannot have intended that in the discharge of this extended interpretative function the court should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

As I said in my keynote address, *Ghaidan* is a powerful statement of the courts' preparedness to interpret legislation so that it is compatible with human rights. It is very far from being aimed at the

interpretation of the legislation as a reflection of what Parliament must have intended. Francis Bennion says that the *Human Rights Act 1998* has revolutionised our constitution. He is right in that. It also revolutionised interpretation in relation to legislation where there is a challenge on human rights grounds. In other respects, statutory interpretation is not affected, but human rights challenges are significant, and so the exception made by the *Human Rights Act* is a significant one.

Where a question arises as to compatibility with the Convention, therefore, the courts do not have to seek the intention of Parliament in the particular text. The courts must adopt what is sometimes called a "strained construction" in order to achieve compatibility with the Convention. I do not consider that future generations will necessarily regard this sort of interpretation as "strained". Rather they will see it as an illustration of a more dynamic approach or the Dynamic Model. The court in this context is no longer an agent simply for the purpose of ascertaining Parliamentary intention. The court has an independent role as guardian of the rule of law and human rights.

When there is an issue as to compatibility with the Convention, the question may arise whether the legislative act is necessary in a democratic society or serves a legitimate aim. Article 8 of the Convention, for instance, provides that there can be interference by public authorities with the private or family life of an individual if that is necessary in a democratic society, proportionate and in accordance with the law. The same pattern appears in many Commonwealth constitutions.

In respect of these questions, the Judiciary is required to decide some novel and profound questions of moral and political significance. The decisions of the higher courts may have substantial and social implications. What is there to assist them? In the United States, there are two schools of thought. Some believe that judges should apply the view of the constitution which would have been adopted by those who ratified the constitution in the eighteenth century. But why are the views of the original founders of the Constitution superior? Their view of, say, equality may be quite different from our own. The opposing point of view is that the judges should reach their own decision as of the date of their decision on what the Constitution requires. Questions of interpretation can only be decided in the context and culture in which they arise. On the other hand, this approach is open to the objection that it can confer too much power on the judges. People who favour this approach sometimes go further and say that because Parliament is so busy and unable to deal with matters of detailed law reform, it should be for the judges to update laws when they need to be updated. But this too runs into the objection that it confers much too much power on judges. It is not always possible for the judges to act in accordance with public opinion, because public opinion may not exist or it may be misinformed.

The American debate does not apply as such in our jurisdiction. But we still have to ask ourselves where we should seek to find the answers to the difficult questions posed by the qualified Convention rights. Is public opinion relevant? It may be divided or not fully informed. It can be said that even recognition of relative institutional competence – that is, a decision that the Executive or Parliament are better able to form a view on a particular matter – constitutes a form of moral or political judgment by judges that in that situation the courts should exercise restraint. The question has to be asked whether there is ultimately anything, apart from sound moral and political reasoning, to assist the judges on questions such as those arising on the application of qualified rights?

What do I find useful in legislative drafting?

I would like to start by saying that there is something which I definitely do not find helpful, and that is the tendency of some drafters to see how many ideas and concepts they can pack into a single clause. This can lead to great loss of clarity. It is sometimes not clear, for instance, whether conditions that are stated as to be necessary are in fact necessary and exclusive or only necessary but not exclusive. To take an example, a statute may provide that before A can happen, B is necessary and that B is not necessary unless either C or D is present. Can the court say that even if C or D is present, the condition that B is necessary is not satisfied because the further provision that B is not necessary unless C or D is present is a threshold condition and not an exhaustive statement of what necessity is? In these situations, logical purity has been given greater priority than transparency and clarity. If judges find this sort of clause difficult, one must think what the position is for members of the public or lawyers in the profession. Of course, some statutes have to be addressed to a specialist audience. However, they can still be clearly expressed in regard to matters that were clearly anticipated.

In the ultimate analysis, it seems to me that the greatest merit in legislation is its ability to withstand logical analysis. Does it apply with equal logic when situations are put which are extreme? If it cannot withstand this kind of rational analysis, the courts will have great difficulty in interpreting them.

For my own part, I like explanatory notes in general. They can provide an overview and explanation outside the statute. I would accept, however, that in general statutes should contain only operative material. It is an important tool of statutory interpretation that each word should be given meaning and this may not be possible if mere narrative is included.

I would be happy to see some narrative in legislation provided that it is clear that it is simply an aid to interpretation and not to be followed slavishly, or used to restrict the court from adopting the appropriate interpretation. So, in a suitable context, it can be useful to give examples in a statute provided it is clear that there are not restrictive and also provided that they are used sparingly.

On some occasions, there is scope for blue sky thinking by Parliamentary counsel. This was the position in the statement of directors' duties in our new *Companies Act 2006*. This was the largest statute ever passed by the United Kingdom Parliament. It has over 1300 sections (and a mere 16 schedules). It also holds the record for the number of government amendments introduced in the passage of the bill. There were over 400 government amendments taken at the report stage.

The statutory statement of directors' duties largely reflects the previous case law on fiduciary duties but also contains some remarkably ambitious provisions. The provisions codify the duty of directors to act in the best interests of the company, to use their powers for the proper purposes, not to make secret profits and their common law duty to exercise care and skill. The present law on secret profits is codified. This has to be flexible. Suppose a director is engaged in a building company and he is asked to leave. Suppose that before he leaves he is approached by one of the company's principal clients and asked if he would take over their business in a new company. If the director takes this course, would he be misappropriating corporate opportunity? This depends on an evaluation of all the circumstances, such as the circumstances in which the opportunity arose and the relationship of

the client's business to the company's line of business, or whether he took the initiative or was approached and so on. The case law has become relatively inaccessible but the empirical evidence showed that directors wanted it to be codified. But the statute could only provide a snapshot of a living body of law at a particular point in time and for that reason Parliamentary counsel drafted the following for the assistance of the court on interpretation:

> (3) The general duties are based on certain common law and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles and, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties."

Most of these provisions come into force on 1 October of this year and it will be interesting to see how they are used by the courts. But they are an example of blue sky thinking by legislative counsel, who had to find a solution appropriate for the particular context.

Another example would be the *Water Resources Act* of South Africa. That contains narrative about such matters as the need to redress imbalances under the apartheid regime in the allocation of water resources.

Recapitulation

The principal approach used by the courts in England and Wales is one where the judge seeks to find the intention of Parliament as expressed in the language Parliament has used. I have called this the Agency Model. Here a judge applies important presumptions, including the presumption that Parliament intended to fulfil its international obligations adopted into English domestic law. But this is model is not the complete picture. The Agency Model is based on the notion of Parliamentary sovereignty rather than, to quote the American Declaration of Independence of 1776, the notion that all men are "endowed by their Creator with certain inalienable Rights". So too the Agency Model is inconsistent with the direction in the *Human Rights Act 1998* that judges should interpret legislation, whenever passed, so far as possible in conformity with Convention rights. I have suggested that future generations will not regard this as a "strained interpretation", as it is sometimes described. They will recognize that the basis in this context is that the judge is no longer an agent of ascertaining Parliamentary intention and that his function is as guardian of constitutional norms, including human rights. This model I have therefore called the Dynamic Model.

In support of plain law: an answer to Francis Bennion

Mark Adler[1]

Introduction

In *Confusion over Plain Language Law* (CPLL for short)[2] Francis Bennion dismisses the plain language movement "… [as] a misconceived and hopeless project … [which] has failed … because there are five things which are basically wrong with I" The five things are that—

1. The plain language movement does not recognize that law is an expertise.
2. It fails to distinguish clearly between four distinct types of relevant text, namely:
   (a) a text which is law,[3,]
   (b) a text which furthers an act in law,
   (c) a text otherwise addressed to lawyers [in the extended sense he gives "lawyers" in his footnote], and
   (d) a text about law which is addressed to non-lawyers.
3. Because of 2 it muddies the waters by agitating for changes in one type of text which are needed instead in another type of text (if they are needed at all).
4. It has distracted attention from needed reforms in law that are more important.
5. By holding that non-lawyers can do things which only lawyers can be trusted to do, it endangers the public.[4]

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1 Mark Adler recently retired from practice as a solicitor. He was formerly President of *Clarity*, an international organisation that promotes clarity in legal writing (including legislative drafting).

2 The Commonwealth Lawyer (16-2007, pp 63-68).

3 "Law text" for short.

4 *CPLL* p.63.

These five points (which I hope to rebut below) are the only basis offered for his assertion that the project is misconceived, an assertion which fails to take into account the well-documented need for and benefits of reform[5].

Nor does Francis Bennion explain in what sense he asserts that the project has failed. Admittedly, it has not yet succeeded, as most lawyers still write in the traditional style, but there has been considerable progress and it is continuing.[6]

Moreover, the plain language movement is composed of many individuals and organisations around the world. Clarity alone has about 1,000 members, almost all lawyers or law institutions, spread around some 40 countries. PLAIN (an acronym of Plain Language Association InterNational)[7] is another major organisation in the field but is concerned with all disciplines rather than just law and consequently has more non-lawyer members. There are many other organisations and many unaffiliated individuals who

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5 From academic lawyers, see, for example, Professors David Mellinkoff: *The Language of the Law* (Little, Brown & Co, 1963) and Joseph Kimble: *Answering the Critics of Plain Language* and *Writing for Dollars, Writing to Please* (in *The Scribes Journal of Legal Writing* Vol 5, 1994-95, and Vol 6, 1996-97).

From the bench, see, for example, Trafalgar House Construction v. General Surety & Guarantee Co (1994 66 Building Law Reports 47) and Bank of Credit and Commerce International SA v. Munawar Ali & others (2001 UKHL 8; 2001 1 All ER 961; 2001 2 WLR 735 paragraph 38). In the first, Lord Justice Saville (supported by Lord Justice Beldam and Sir Thomas Bingham MR) said: "I would only add a suggestion both to those who seek and to those who provide securities for the performance of commercial obligations. They would save much time and money if in future they heeded what Lord Atkin had said so many years ago and set our their bargain in plain modern English without resorting to ancient forms which were doubtless designed for legal reasons which no longer exist." In the second case, Lord Hoffmann said: "The modern English tradition, while still erring on the side of caution, is to avoid the grosser excesses of verbiage and trust to the judges to use common sense to get the message. I think that this tendency should be encouraged."

From a non-lawyer, see for example Martin Cutts: *Lucid Law* (Plain Language Commission, 2nd edn, 2000).

From practising lawyers, and for many more examples, see MichèleAsprey: *Plain Language for Lawyers* (3rd edn, Federation Press 2003; Mark Adler: *Clarity for Lawyers* (2 edn, Law Society, 2006); and Clarity's website at <www.clarity-international.net>.

The need for reform is also explored in detail in the book criticised in Francis Bennion's article: Peter Butt and Richard Castle: *Modern Legal Drafting* (2nd edn, Cambridge University Press 2006).

6 See, for example, the UK Arbitration Act 1996, the tax law revision projects in the UK, Australia, and New Zealand, the Australian Commonwealth's Corporations Act 2001, the Civil Procedure Rules in the UK, and the Federal Rules of Civil Procedure and the Securities & Exchange Commission requirements for plain prospectuses in the USA. For many more examples, see Butt & Castle and Asprey (both cited in footnote 5), and all issues of *Clarity*.

7 www.plainlanguagenetwork.org

could be considered part of the plain language movement, though there is no clear boundary between active campaigners and those who merely support the movement.

To attribute a single belief or a single technique to such a diverse collection of people is far less realistic than attributing an intention to parliament. Parliament at least is a single body which meets in one building and votes. In contrast, the plain language movement has no machinery for forming collective decisions, or even for all the constituent parts to communicate with each other, not least because no-one knows the identity of, nor how to contact, all the individuals involved.

It is difficult to deny Francis Bennion's propositions about what the movement believes or does without making the same mistake, but I will try to answer his points on the basis of my own practice, discussions over the years with other plain language proponents, and my reading of their books and articles. I think the views expressed here are sufficiently common to justify treating them as the mainstream position, though I invite correction.[8]

The five points

So let us look at the five supposed flaws:

1. The plain language movement does not recognize that law is an expertise

Francis Bennion offers no support for this extraordinary assertion, and I know of no plain language proponent who would deny that law is — obviously — an expertise. A straw poll I conducted by circulating PLAIN's email discussion group produced a unanimous response against abolishing lawyers. Here are two typical comments, both from non-lawyers:

- We will always need lawyers for their knowledge of the law. Even if all laws were written in plain language we would still need to consult experts on the law, because it's such a huge subject area[9].
- I'm not at all in favour of dispensing with lawyers (or doctors, or engineers, or financial advisors). I'm in favour of enlightening them[10].

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8 None of the plain language proponents (listed ar the end) who read drafts of this article disagreed. But my thanks to them for correcting various errors and infelicities and for suggesting improvements, many of which I have incorporated.

9 David Fox, The Word Centre: email 15.11.07.

10 Debra Isabel Huron: email 15.11.07

Patients who understand what their doctors tell them do not believe as a consequence that diagnosis and treatment are unskilled. I practised law in the high street for some 30 years, and was always conscious of how much more there was to know than one person could grasp in a lifetime. But even in areas where I felt confident in the law it was tedious and frustrating to waste a large part of each day trying to unravel semi-literate English before I could advise on the substance of what the writer had been trying (often unsuccessfully) to express.

2. It fails to distinguish clearly between four distinct types of relevant text …

It is of course necessary to distinguish between the four types of text at one level; they each have a different purpose, and writers must write with both their present purpose and their intended audience in mind. But at the level above they share common characteristics: they are all documents connected with the law. And at the level above that, they share common characteristics with non-legal documents. In trying to write plainly we are not confusing different sub-categories; we are applying the principles of good writing to all types of text. Statutes and advice to clients will have different purposes, different audiences, and different tones, but both types of text are amenable to the principles of good writing.

I am far from sure that I accept Francis Bennion's axiom that the law "resides only in [the] words [of a law text]"[11], a doctrine reminiscent of the discredited[12] theory that thought resides only in words. Pioneering judges formulating a novel legal principle try to put into words the principle they have in mind (and which, according to convention, is *already* the law); later judges restating the principle do so in their own, different, words. In each case the principle precedes the words. This may also apply to statute law, whose words are intended to embody "the will of parliament" and may — in America at least — *not* constitute the law if the statute is unconstitutional. But I am straying from my theme.

Francis Bennion argues:

> The purpose of a law text is geared to this function of *constituting* the law…. (I)t is not the function of a legislative text to explain the law. Explanations should be given *aliunde*[13].

But a law text must explain the law to someone — if only to lawyers — so that they can pass the information in simpler form to the public. So a function of the text *is* to explain. We only disagree about the extent of the audience for which it is to be designed.

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11 *CPLL* p.63.

12 This is outside my field but see, for instance, Steven Pinker: *The Language Instinct,* Penguin Books, 1994, p.55 and following.

13 *CPLL* p.63.

Moreover, many plain language proponents have pointed out that lawyers also benefit from plain language. It makes their documents more effective and in particular saves them — whether they are writers or readers — time, money, and mistakes[14]. There is no reason to disapply this finding to legislation.

Even if lawyers were perfect, explanation (and other forms of translation) never can be. Words are blunt instruments, and even the best writers can only sharpen them so far. There will inevitably be differences between the original text and the translation; if not, the translation could stand as the law. Plain legislators seek to make their text both constitute and communicate the law, as far as is practicable, not only for economy and convenience but to avoid this source of error.

3. Because of 2 it muddies the waters by agitating for changes in one type of text which are needed instead in another type of text (if they are needed at all)

The main part of this criticism falls with point 2.

The afterthought in parentheses suggests that Francis Bennion doubts that any improvement is needed in legal writing. Yet in his second paragraph he acknowledges that "all right-thinking people admire plain language and seek to promote it" and he restricts his criticism to the extent to which the reform is "overdone" (in that it is applied to all documents rather than just those for which it is suitable). He acknowledges that:

> … the contribution of the plain language movement has been positive … (for) text which gives legal guidance to a lay client or to members of the public generally, or is designed for use by lay persons (such as a statutory form for a self-assessment tax return or hire-purchase contract).[15]

Putting the afterthought to one side, the thrust of point 3 is that although "[m]any pre-twentieth century Acts of the Westminster Parliament were not fit for [their] purpose[16] … [l]egislative drafting in England and elsewhere in the Commonwealth has now reached [the] high degree of precision" needed to prevent misunderstanding even by a reader in bad faith. A 1963 dictum of Lord Reid is cited in support.

In seeming contradiction, Francis Bennion continues:

> To an extent law texts are now comprehensible to lawyers. But there is still much that needs

[14] See the sources cited in footnote 5.

[15] *CPLL* p.67.

[16] Though only because they were poorly organised (*CPLL* p.64).

> to be done in the way of reform.[17] [*his emphasis*]

Although Francis Bennion cites *Lucid Law*[18], he does not challenge any aspect of its criticism of the drafting of the *Timeshare Act 1992*, nor point to any error in the revision by Martin Cutts (a non-lawyer).

The work of parliamentary counsel in the UK is generally clearer — more precise and less obtuse — than that of most lawyers in private practice. But I disagree with the suggestion that since 1963 (or at any time since) our legislation has been so good that it has needed no help from the plain language movement.

The late Lord Renton put it more robustly, writing in 2006 of the effect of his committee's 1975 report *The Preparation of Legislation*[19]:

> Our conclusions were broadly unanimous, and the Report was welcomed by both Houses of Parliament. However, the Parliamentary draftsmen and the Civil Servants did not welcome our recommendations, for it meant that, instead of drafting legislation in varied ways that they preferred, it would have to be drafted in accordance with broad principles which we had defined. Therefore, although those principles had been welcomed by the Lords and the Commons, the Civil Servants and Draftsmen carried on in their own way. The Lord Chancellor and the rest of we Parliamentarians were simply ignored, except occasionally; and so our statutes have not for the most part improved their drafting—and clarity has not been achieved to a great enough extent. [20]

If Francis Bennion was right about the precision of modern drafting *Pepper v. Hart*[21] would not have been necessary. But the problems arising from unclear legislation were considered so important that seven law lords heard the case, and they unanimously overturned long-established principle to allow the court

> to permit reference to Parliamentary materials where … [l]egislation is ambiguous or obscure, or leads to an absurdity ….

And they applied their new rule in that case because—

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17 *CPLL* p.64

18 See my footnote 5.

19 Cmnd 6053, London, HMSO 1975.

20 *Clarity* 56, November 2006.

21 (1993 AC 593); www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1992/3.html&query=pepper+and+v.+and+hart&method=boolean

> Subsections (1) and (2) of section 63 of the *Finance Act 1976* introduced an element of ambiguity.

Loophole readers hardly need my help in listing post-1963 examples of unclear legislation but I have chosen one at random from 2007[22]:

> All the amounts and sums authorised by this Act and the other Act mentioned in Schedule 1 to this Act for the service of the year ending with 31st March 2008, totalling, as is shown in the said Schedule, £429,937,119,000 in amounts of resources authorised for use and £393,991,012,000 in sums authorised for issue from the Consolidated Fund, are appropriated, and shall be deemed to have been appropriated as from the date of the passing of the Acts mentioned in the said Schedule 1, for the services and purposes specified in Schedule 2 to this Act.

Does this 96-word sentence justify complacency about our drafting standards? For instance, what, if any, is the intended difference between an "amount" and a "sum"? There are 10 instances of "amount" in the Act. In seven the reference is to "amounts and sums" but each word is used elsewhere independently of the other. The duplication seems to have been introduced in the 2001 Act, earlier Appropriation Acts making do with "sum" alone.

Legislative drafting *has* improved since 1963, and much credit goes to the current generation of parliamentary counsel — and some recently retired — (who I doubt were responsible for the recent Appropriation Acts). But this improvement is a *result* of their commitment to plain language, and does not constitute an argument that plain language is misconceived or unnecessary.

Meanwhile, most lawyers in private practice continue to draft in traditional style, but with far less skill than parliamentary counsel. Improvement is hardly "misconceived".

4. It has distracted attention from needed reforms in law that are more important

Francis Bennion does not identify any alternative reform that has suffered. But even if his assertion was correct the distraction could not be said to have caused the failure of plain language; if anything, it would have contributed to the failure of the *other* campaigns. That apart, the relative merits of the candidates for reform are a political matter, logically independent of the inherent merits of any particular reform.

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[22] I looked on BAILII for the UK's 2007 Acts — to be as up-to-date as possible when this was written last year — and chose the first in the alphabetical list, which happened to be the Appropriation (No.2) Act. Ignoring its first two clauses as too short to be representative or instructive, I took the next sub-clause, 3(1).

5. By holding that non-lawyers can do things which only lawyers can be trusted to do, it endangers the public

This is the nub of Francis Bennion's disagreement with plain language proponents. But it is a dispute about degree, not principle: about *how much* can be left to non-lawyers, not whether *anything* can. And we must consider separately what reading and what writing can be trusted to non-lawyers.

Reading

Perhaps we can agree that lawyers should minimise the difficulties their clients have with text the lawyers have written, to avoid any *avoidable* need for clarification. But *CPLL* seems to advocate that texts of type (a) to (c) should be written more obtusely than is necessary to ensure that only lawyers can understand them.

If this is Bennion's position it can be challenged at two levels: principle and practice.

Principle

The principled argument, as it applies to statute law, was recently set out in *Presentation of New Zealand Statute Law*:[23]

> It is a fundamental precept of any legal system that the law must be accessible to the public. Ignorance of the law is no excuse because everyone is presumed to know the law. That presumption would be insupportable if the law were not available and accessible to all. The state also has an interest in the law's accessibility. It needs the law to be effective, and it cannot be if the public do not know what it is.[24] …
>
> It seems once to have been supposed that law was the preserve of lawyers and Judges, and that legislation was drafted with them as the primary audience. It is now much better understood that Acts of Parliament (and regulations too) are consulted and used by a large number of people who are not lawyers and have no legal training. Many people refer to legislation in their jobs. People who work in the registries of universities and other educational institutions make constant reference to education legislation; employers and trade union officials need to be well versed in employment legislation; the staff of many government departments, many of whom are not legally trained, work closely with the legislation that their departments administer; the staff of local authorities need to access the

[23] By the New Zealand Law Commission in conjunction with Parliamentary Counsel Office (Law Commission, Wellington, 2007, available from www.lawcom.govt.nz/ProjectIssuesPaper.aspx?ProjectID=132).

[24] Paragraph 1.

> large quantity of local government legislation; and company officers need to consult company and financial reporting legislation. At other times ordinary people refer to Acts of Parliament to find the answers to problems that affect them in their personal lives: difficulties with a neighbour may lead to them consulting the *Fencing Act 1978*; domestic difficulties may lead to them consulting our family and relationship legislation.[25]

This contrasts with the view which Francis Bennion attributes[26] to Sir Geoffrey Palmer, the New Zealand Law Commission's president, under whose name that report was published but whom Bennion quotes in support of his own view that it is unsafe for the public to have access to statutes. But the full text of the paragraph from which Francis Bennion takes his quotation reads:

The common law and judicial decisions interpreting statutes are inaccessible to ordinary citizens so *it may be asked*, is it safe to give them access to statutes? People may come to grief advising themselves. There is a tendency in some quarters to think that the law is a mysterious science that should be only revealed to those who are initiated, namely lawyers. *But is this defensible in a democratic society?*[27] [*my emphasis*]

And in paragraph 29 of that Address Sir Geoffrey says:

> The establishment of the Law Commission … was fuelled by the vision that the law could be accessible, understandable, coherent and administered fairly by institutions that are neutral and behave with integrity. These are hopes that ought not to be abandoned lightly.

The implication that we ought to keep legal texts more obscure than necessary to protect the public from itself is politically (and to me, morally) unacceptable.

Practice

The practical argument seems even more telling. The idea that all (or even many) of those who need advice can receive it from a competent lawyer is a utopian dream.

Lawyers are expensive beyond the reach of most people. How will those who cannot afford a lawyer understand the subtleties hidden by the drafter?

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25 Paragraph 11.

26 At page 64. But no primary source is cited and the fragment that Francis Bennion quotes is inconclusive.

27 *Law reform and the Law Commission in New Zealand after 20 years – We need to try a little harder,* Address to the New Zealand Centre for Public Law, Victoria University of Wellington, 30 March 2006, para 62. <www.lawcom.govt.nz/UploadFiles/SpeechPaper/d0c9b674-5a55-405d-9b3c-2cfd467a0d5d//Law%20Reform%20and%20the%20Law%20Commission%20in%20NZ%20after%2020

Lay people affected by law texts and by documents in Bennion's category (b) — texts which further an act in law, such as wills, leases, and other contracts[28] — benefit enormously from being able to consult these documents themselves when either cost or convenience make legal advice impracticable. The Civil Procedure Rules 1998 are a notable example. In language readily understandable by litigants in person but in a tone also suitable for lawyers, Lord Woolf rationalised the County Court Rules and the High Court Rules, removing anomalies and combining them into a single coherent system. In what sense was this reform "misconceived and hopeless"? [29]

Moreover, many of the lawyers who *are* consulted are *not* skilled. The selection of lawyers in private practice is much less rigorous than that of parliamentary counsel. Often — in England at least — the only training they receive in drafting skills is to repeat verbatim what they find in precedents, uncritically and with little regard for their clients' needs. And few have the time or (I suspect) the inclination to keep up with all the changes in the law; certainly no busy general practitioner ever could remain up-to-date in all their fields. Many examples of the consequent mistakes are quoted in the sources cited in footnote 5.

Even the privileged minority who have a competent lawyer are inadequately protected. Only the rashest practitioners would be confident that they had picked up all the ambiguities and omissions in long stretches of turgid legalese. And only the most resolute clients would remain awake throughout the attempted explanation; none will be keen to pay for that explanation or for the negotiation of any corrections necessitated by bad drafting.

There is a more pressing reason to ensure comprehension, which I put this way in *Clarity for Lawyers*:

Our oblique language allows us to exclude clients from their proper part in the decision-making. We should be acting as guides to our clients; if we are to do so, they must be able to follow us.

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[28] *CPLL* pp.63 and 66.

[29] Francis Bennion's only criticism of the Civil Procedure Rules is the superficial point that "the term *writ* is now abolished in favour of *claim form.* There's elegance!" (*CPLL* p.66) I agree with him that some of the name changes seem unhelpful and inelegant (as in *statements of case* for *pleadings*) but this is a minor and debateable matter. And the old word *writ was* open to criticism; it was generally used by the profession to mean the document issued by the plaintiff to begin a High Court action, but:

- *Summons* was used for the document used in county court actions (a distinction of which few non-lawyers were aware), and some High Court actions were begun by originating application; and
- There were other types of writ in the High Court, for example the *writ of fieri facias* and the *writ of habeas corpus.*

Apart from the clients' right to make the decisions, they should be part of the team. Usually they will know their case better than we do, and it is important that they should be able to correct mistakes, remedy oversights, and contribute suggestions.

In many years of drafting pleadings, witness statements, and affidavits, it is only in the most trivial circumstances that I have ever been able to treat the first draft as the completed document. However careful I am, I expect in distilling detailed instructions into a coherent story to put the occasional wrong shade of meaning (if not an outright mistake) into the client's or a witness's mouth, and sometimes I have missed a point altogether. It is essential that those affected can read and correct the drafts before their opponents can benefit from the mistakes, and of course before signing a statement of truth. [30]

The same principle applies to contractual and probate documents. Those drafted so as to be unintelligible to our clients inevitably contain the mistakes the clients were unable to see.

Francis Bennion also challenges the notion that respect for the law requires that it be comprehensible to a lay audience. He quotes[31] Clarity's submission to the *Hansard Society*[32]:

If laws cannot be readily understood by those most affected by them the social cost is an increasing ignorance of the law and growing disrespect for the law and those who administer it.

Bennion replies:

> This is a *non sequitur*: the inference or conclusion does not follow from the premise. The fact that law texts cannot be readily understood by those most affected by them does not inevitably lead to an increasing ignorance of the law.

But the expression "non sequitur" is wrongly used. Nobody is suggesting that it is a logical inference, merely that in fact this is what is likely to happen.

Writing

Francis Bennion is right to deny the assertion that "persons lacking legal training can safely be trusted to rewrite legal documents in plain language"[33] but he is wrong to call that assertion an error of the plain language movement.

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30 2nd edn, p. 26.

31 *CPLL* p.63.

32 *Using Plain English in Statutes*, June 1992 (written by David Elliott, an experienced legislative drafter).

33 *CPLL* p.65.

In drafting or improving legal documents (in any of Bennion's four classes) a reputable plain language expert — even a lawyer, if not a specialist in the relevant field — would expect to work with, or at least have the work checked by, a lawyer who *was* such a specialist.[34]

In Dr Robert Eagleson's words:

> The process of removing gobbledegook from a document may uncover injustices and cumbersome procedures and lead to their removal. Indeed, any properly conceived project to improve comprehensibility should begin with an examination of the underlying policy content. … But the ultimate responsibility for these changes in content does not rest with the language experts. … The simplification of content falls squarely in the province of the professionals in the area; only they are expert to know what is necessary and what can be omitted safely. The best results in simplification come from comprehensive collaboration of all those concerned with a document.
>
> This point must be emphasised: the thrust for plain English is concerned with communication, not with the law or policy as such. We are seeking to improve the quality of that communication. The role of parliamentary counsel and officials as practitioners and interpreters of the laws and policies is not in question. Plain English will never reduce the scope of the law, but it will rescue its expression from obscurantism and mumbo-jumbo in which it is often encased.[35]

The attack on Modern Legal Drafting

In support of his thesis Francis Bennion selects for criticism extracts from Peter Butt and Richard Castle's *Modern Legal Drafting*[36].

He quotes with disapproval Butt and Castle's statement:

> Phrases of this kind [*de bene esse*, *en ventre sa mere*, *force majeure*, *inter vivos*, *res ipsa loquitur* and *ultra vires*] are best abandoned, for three reasons. First, the average reader will not understand them. Second, their foreign origins convey a sense of precision and

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[34] I know of one firm that does seem to rely overmuch on unqualified writers; it has produced over-simplified text and other poor work. But the existence of a few incompetent doctors does not mean that the practice of medicine is misconceived.

[35] Discussion Paper No. 1 *Legislation, Legal Rights and Plain English*, Victorian Law Reform Commission August 1986, pages 7-8. Dr Eagleson, a linguist widely known for his skill in applying plain language principles to legislative drafting, had been appointed to the VLRC as Commissioner-in-charge of the government's reference on *Plain English and the Law.*

[36] Cited in footnote 5 above.

> technicality which they simply do not possess. Third, they are not true legal terms of art. *Almost* always they can be discarded for an equivalent in modern English.[37] *[Bennion's emphasis]*

Bennion explains that it is unnecessary to avoid these expressions in law texts, as the texts are designed only for lawyers and "(t)he average lawyer will understand these terms". Apart from our difference about the need to write for a lay audience, I disagree with this on two grounds. First, a drafter should be writing for all the lawyers who may have to cope with the text, and not just those vaguely categorised as "average". Second, few lawyers now have a classical education. Although I learned a little Latin I was defeated by two of Butt and Castle's list and would no doubt fare worse with the less common tags.[38]

Bennion continues:

> … jargon has a value when used between professionals. Some fields of law are highly technical.[39]

But Butt and Castle agree with him:

> Jargon may be acceptable in a document that a lawyer drafts solely for another lawyer, but it is not acceptable in a document that a lawyer drafts for a client….[40]

To be distinguished from the unthinking and unnecessary use of jargon is the appropriate use of technical terms — "terms of art". Like other professions, law contains an irreducible minimum of terms of art, that is, terms which have a peculiar and fixed technical meaning, unmodified by context, and which are difficult and sometimes impossible to express in any other way.[41]

Inter alia, for instance, is not a term of art. Francis Bennion feels that its English equivalent, "among other things", "lacks learning"[42]. Contrast this view with that of Bertrand Russell:

> I am allowed to use plain English because everybody knows that I could use mathematical logic if I chose. Take the statement: "Some people marry their deceased wives' sisters." I

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37 MLD p.142. The examples in square brackets are Bennion's selection from the twelve listed in MLD.

38 My father kept a legal dictionary by his phone to get him out of trouble when another solicitor quoted a Latin phrase. He'd look it up, find another at random, and quote that back. As far as I know he was never challenged.

39 *CPLL* p.65.

40 *MLD* p.147.

41 *MLD* p.149.

42 *CPLL* p.65.

> can express this in language [that] only becomes intelligible after years of study. I suggest to young professors that their first work should be written in a jargon only to be understood by the erudite few. With that behind them, they can ever after say what they have to say in a language "understanded of the people".[43]

Bennion supports his related point that "it is so-called plain language [not traditional legal language] that lacks style"[44] with an Australian obiter dictum:

> The provisions of the Corporations Law that include s.553C are, as I observed in the course of the argument, drafted in the language of the pop songs. Section 435A speaks of "maximis[ing] the chances" and s.435C of "[t]he normal outcome" and "the deed's administrator". Section 435C(3) begins with the word "However" and a comma, a style that, at least until recently, has been eschewed by good writers.[45]

Whatever unusual pop songs the judge has heard, he clearly had a nasty smell under his nose, but he is condemning the style of Lords Denning and Scarman and many other eminent jurists.[46] And he is hardly a credible authority on matters linguistic. As Fowler says:

If the sense calls for *However* (meaning "nevertheless") to be placed at the beginning of a sentence, it should be followed immediately by a comma.[47]

The "Jack-and-Jill" jibe has been rebutted many times. For instance, Dr Eagleson characterises plain language as:

> Clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted construction. It is not baby talk, nor is it a simplified version of ... language.[48]

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43 How I Write quoted by Bryan Garner: *A Dictionary of Modern Legal Usage*, Oxford University Press, 2nd edn, 1995, p. 661.

44 *CPLL* p.65.

45 Callaway JA in *GM & AM* Pearce *and Co Pty Ltd v RGM Australia Pty Ltd* (1997 VSC 63); (1997 VICSC 63); www.austlii.edu.au/au/cases/vic/VSC/1997/63.html.

46 See my footnote 5.

47 Fowler's Modern English Usage, Oxford, 3rd edn, 1996, p. 367.

48 Writing in Plain English, Australian Government Publishing Service, 1990, p.4. Dr Eagleson helped draft the Corporations Law, though parliamentary counsel retained responsibility.

And Professor Joseph Kimble reminds us that good literature relies on a plain style, describing plain language as:

> … the style of Abraham Lincoln, and Mark Twain, and Justice Holmes, and George Orwell, and Winston Churchill, and E. B. White. Plain words are eternally fresh and fit. More than that, they are capable of great power and dignity: "And God said, Let there be light: and there was light. And God saw the light, that it was good."

Francis Bennion confuses good plain writers with incompetent ones. He continues:

> Another shibboleth of plain language campaigners is that lawyers should eschew stuffy legal terms like "hereby" and "thereby". Again they show their ignorance, for such terms have an important function in law. They are … performative utterances. [49]

Again Butt and Castle had pre-empted this criticism, devoting a whole page to a section headed "*Hereby"*:

> "Hereby" deserves special mention. Drafters in the traditional style have a particular affinity with it. Nothing is ever simply done; it is "hereby" done. Presumably the drafters consider that "hereby" adds precision. But this is not *always* the case — "hereby" can in fact introduce ambiguity….

It is true that "hereby" can give a particular emphasis to an action. But even then it is *usually* legal surplusage. [50] [*my emphasis in each paragraph*]

Some years ago Professor Butt had reported the *Riltang* decision[51] (one of his examples in *Modern Legal Drafting*) in *Clarity*:

Most experts on plain language legal drafting recommend that we avoid using "hereby". They make the point that nearly always "hereby" is superfluous. It adds "legal feel" to a document without adding any legal substance. For what it is worth, I would recommend avoiding it also. However, in rare cases "hereby" has proved useful as a backstop to clarify meaning, illustrating that an overly doctrinaire approach to so-called "principles" of plain legal language may be self-defeating.[52]

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[49] *CPLL* p.65.

[50] *MLD* p.148.

[51] *Riltang Pty Ltd v. L Pty Ltd* (2002 11 BPR 20,281 at 20,286 [para 24]).

[52] *Clarity* 48 (December 2002), p.34.

This triggered a debate in the following two issues[53] about whether "hereby" was necessary or helpful to distinguish a performative statement from a statement of fact. Donald Revell thought "hereby" was useful for performative statements:

> Assume we come across an act that states "The XYZ Corporation is established". This is a statement of fact. It is not an act of creation. It does not tell you the means whereby the Corporation comes into existence. If I ask the question: "Is this an established Corporation?" one would answer: "Yes, it is." But if I ask how it was established, one would answer: "It may have been established by the XYZ Act but I can't be sure".
>
> On the other hand, assume the Act read "The XYZ Corporation is hereby established". This is an act of creation. If the same questions are asked now, the first answer remains the same but the second becomes "It was established by…"
>
> Hereby is not an obsolete word nor is it legalese. While the law will not fall apart if it is dropped, it is my opinion that its elimination makes the law less clear when bodies are being established.[54]

The consensus seems to have been that 'hereby' was best avoided but should be used if ever the alternative was to be unclear.

Bennion goes on to quote with disapproval Butt and Castle's complaint that:

> … legal language "has a unique tendency to be wordy, unclear, pompous and dull" and "is also impersonal, lacking warmth".[55]

He does not disagree (except that the tendency is unique) but neither does he explain why these defects should not be minimised, except that he ridicules the supposed suggestion that Acts of Parliament should be "arch" or "warm and friendly".[56] However, at this point Butt and Castle were not talking about legislation but about lawyer-client communications, which should strike the right balance, appropriate for the particular client, between the impersonal and the familiar.

Francis Bennion then criticises Butt and Castle's suggestion that:

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53 *Clarity* 49, (May 2003), p.32; and 50 (November 2003), p.37. All three issues are available from www.clarity-international.net.

54 *Clarity* 49 (May 2003), p.32.

55 *CPLL* p.65, citing *MLD* p.120.

56 *CPLL* p.66.

> … it may be appropriate to use both "must" and "is to" in the same document. Variation can add interest, provided it does not introduce ambiguity or uncertainty.[57]

He comments:

> But it *does* introduce ambiguity or uncertainty — inevitably. It breaks one of the clearest rules of drafting, which is never to change the form of words unless you are going to change the meaning. It is dangerous.[58]

Again, the context draws the teeth of the criticism. Butt and Castle say, discussing "must" as an alternative to "shall":

> The tone of a document may be important. For instance, where parties have worked hard to develop a relationship of mutual cooperation and respect, an overuse of "must" in the document which regulates their relationship might be thought to introduce an unnecessarily adversarial attitude. In such a case, the drafter might try "is to"…. *And despite the principle that drafters should be rigorously consistent in their use of terminology*, in a lengthy document the drafter may well slip. Indeed, some variation of terminology *may be appropriate in different parts of the document where a different tone is called for.*[59] [*My emphasis*]

Although Francis Bennion says that "Butt and Castle … [is] in many ways … a useful book" he accuses the authors of "serious errors". The footnote to "serious errors" cites only one:

> For example, it praises (p.61) the so-called golden rule of interpretation, citing in support an extra-judicial remark of Lord Macmillan from as far back as 1931. There have been many developments in statutory interpretation since then, and this "rule" was exploded many years ago by the late Sir Rupert Cross.[60]

This suggestion of poor scholarship seems particularly misconceived. Butt and Castle devote pages 61 to 72 to developments in the law since 1931, citing 25 cases between 1995 and 2004 alone, and they devote an entire section to the "modern restatement" by Lord Hoffmann.[61]

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57 *MLD* p.203.

58 *CPLL* p.66.

59 *MLD* p.203. Butt and Castle cite two NSW statutes in which this is done.

60 *CPLL* p.67.

61 *Investors Compensation Scheme Ltd v. West Bromwich Building Society* (1998 1 WLR 896).

Francis Bennion's final criticism is of Butt and Castle's suggested revision of a contract for constructing a street. They had changed:

> The Builder shall at his own expense construct sewer level pave metal kerb flag channel drain light and otherwise make good (including the provision of street name plates in accordance with the requirements of the appropriate District Council and road markings and traffic signs in accordance with the requirements of the Council) the street.

into:

> The Builder must construct the street to Council specifications. [62]

Bennion finds these faults:

1. It omits to say that the work shall be done at the Builder's own expense.
2. It does not mention items whose inclusion may be in doubt if they are not specified, such as sewerage, lighting and street name plates. It speaks of "Council specifications" without identifying the "Council" as the appropriate District Council.
3. More importantly, it places no limit on what under the contract the Council are entitled to specify - though limits there must plainly be. They are left to be gathered by implication, about which there could be endless doubt and argument. No contractor could safely tender for the project when so much was left uncertain. No good lawyer would draft in such terms. If a lawyer did draft this example he or she should be disciplined.[63]

My general reply is that if any of these criticisms is justified the draft can be corrected in plain language, presenting as much detail as necessary, as clearly as possible, and excluding only that which is *un*necessary. But on the detailed points:

1. This is taken from an agreement under s.38 of the [UK's] Highways Act 1980. These impose obligations on a developer to create roads joining the houses on a proposed estate to the public highway. Builders must do what the agreement requires, and whom they persuade to pay for it is their own affair. If anyone else were to be bound to pay the agreement would say so.

But if this had not been the case the clause could have read:

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62 *MLD* p.114.

63 *CPLL*. p.67.

The Builder must construct the street at its own expense to Council specifications.

2. The district council (which would have been identified at the beginning of the document) must be the one in whose jurisdiction the road is to be built.

2&3: The specifications are agreed before the agreement is signed.

3. The agreement would have been drafted not on behalf of the builder (as the criticism suggests) but of the highway authority, who would *benefit* from the more general wording of the revision if the specifications remained open. The original drafter left his or her council client open to the undesirable application of *eiusdem generis* and *expressio unius*. [64]

Bennion excuses the poor style of the original building contract:

> The actual readership [of this text] is not likely to extend much beyond the legal departments of the two corporations and the clerk of the works of the successful contractor. They will have no trouble with the traditional version's absence of punctuation or lack of elegance.[65]

Again, I disagree. The land registry records s.38 agreements in the charges register of each house sold and a copy is supplied to (and so should be read by) the solicitors for each purchaser. The glut of words and the lack of punctuation *does* give trouble, in wasted time and the risk of error. In particular, I frequently found similar passages whose lack of punctuation made it impossible to tell whether a particular word or phrase modified the adjoining word or was a separate item.

Finally, Francis Bennion prays Lord Bingham in aid, so may I do the same? I think this next quotation reflects the views of most plain language proponents:

> Complexity cannot be altogether avoided where the subject matter is complex, and there is great wisdom in the advice attributed … to Einstein: "Make it as simple as possible, but no simpler".[66]

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[64] My replies to these 3 points have been confirmed by a former client who has worked for many years in the appropriate department of a district council. In particular, he confirms that the specifications are agreed in advance, and he adds:

> The original list that you quoted of metalled paved drained etc is commonly used and is an old historic description of a highway that tends to be incorporated in Agreements, but by no means is complete as to what is fully required.

[65] *CPLL* p.67.

[66] Lord Bingham's foreword to *Clarity for Lawyers* (cited in footnote 5).

Conclusion

Despite the sometimes harsh tone of *CPLL*, several passages seem more sympathetic to the ideals of plain language than the parts that have stimulated this reply. As Francis Bennion says, his drafting of the *Consumer Credit Act 1974* — with its unusual enactment of examples[67] — is only one instance of his own commitment to clarity.

Perhaps his disagreement with the plain language movement is only about the extent to which it is practicable (or safe) to clarify. If so, I think that his fears are based on a misapprehension of the movement's standards and that experience justifies greater optimism.

For their answers to my questions and in some cases for helpful comments on various drafts of this article, I am grateful to Michèle Asprey, Peter Butt, Sarah Carr, Richard Castle, Martin Cutts, Janet Erasmus, David Fox, Debra Huron, Joseph Kimble, Gary Larson, Joanne Locke, William Lutz, Diane MacGregor, Sally McBeth, Eamonn Moran, Christine Mowat, Judge Mark Painter, Stephen Roch, Cheryl Stephens, Ann van Regan, Jeremy Wainwright, Christopher Williams, and Ron Wohl.

[67] Mentioned in *Clarity for Lawyers*, p.74.

The Role of Legislative Counsel: Wordsmith or Counsel? [1]

David Hull[1]

In small jurisdictions we have a particular interest in ensuring that ministers, civil servants and other public lawyers, and we ourselves, understand the nature of the function of legislative counsel. Our own resources are severely limited. Recruitment is a problem. The number of lawyers who seek a career in public law is small. Of those who do, still fewer are eager to write laws. These things are as true in small developing countries as they are in prosperous offshore finance centres where the attractions of private practice are so obvious.

There are corresponding constraints within our client departments. In many larger countries, it may be possible to insist that proposals for primary legislation are dealt with only by senior civil servants who have the ability to conceive, to explain and develop them fluently and comprehensively, and to comment critically on drafts. Technical expertise on the substance of a proposal will be readily available. Characteristically, those resources are not available to us to the same extent either. These things affect the passage and quality of our legislation. In seeking to counter their effects, we resort to expedients.

In the topic for this session, I take "wordsmith" to be used (provocatively, to stimulate discussion) in the sense of a scribe or penman – a person who simply writes at the dictation of another. Very occasionally, we do encounter departmental officers who begin by making that assumption. The reason is always the officer's inexperience in the preparation of legislation.

But that is uncommon, and it isn't a real problem. It merely wastes some time in getting the job done. Many years ago, a rather controversial Prime Minister in my own country remarked that a Cabinet minister who could not score a political point off a parliamentary question was not up to his job. The same thing might be said of a trial judge who cannot steer a jury in the direction of an appropriate verdict. I think there is something of an analogy there for legislative counsel. Of course we are not

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[1] Legislative Counsel, Jersey, Channel Islands; formerly Chief Justice of Swaziland and Attorney General of Gibraltar.

wordsmiths in any pejorative sense. So far as I know, it has never been suggested that this should be called the Commonwealth Association of Legislative Wordsmiths. In professing our discipline, it lies with us in our dealings with client departments to demonstrate that there is more to it. This may require patience, tact and persuasiveness – and if necessary assertion, though it rarely comes to that. If a civil servant is up to the task of handling legislation, what happens in practice – particularly if a bill is of any length – is that as work progresses, he or she gradually comes to appreciate the interaction that the law drafting process involves.

Much more frequently, the instructing officer approaches his or her task from the other end. Far from regarding legislative counsel as a mere penman, he relies on what he takes to be the other's expertise not only in composition and law but also in the substance of the legislative proposal. In short, he looks to legislative counsel to play the mandarin manqué, and sometimes even the technician too. The case with which all of us are probably most familiar is where the instructor cites an overseas statute with a bare request "to adapt it" for the country concerned.

It seems to me that these two scenarios have a common feature. In the first, the instructing officer is all too obviously unversed in the preparation of legislation. His very literal interpretation of the expression "drafting instructions" betrays him. He is unaware of the art in it. He probably lacks any real grasp of the legal context of a bill. In any case, it is apparent that he does not understand the professional services that legislative counsel provide.

In the other situation, the instructing officer does appreciate that counsel isn't a wordsmith. He knows that the preparation of a bill involves legal issues. He may be conscious as well of what he sees as his own limitations in working up a policy proposal in that setting. Even so, does he himself have a sufficient understanding of the nature of our professional services?

No one here, I imagine, will disagree that composition – the ability to write well – is an essential skill in the discipline of law drafting. What constitutes good writing may be another matter, but presumably we all accept that it is a prerequisite. And because we deal routinely with common legislative techniques – for example, appeals, licensing schemes, the definition of criminal offences and statutory defences, and the bringing of legislative schemes into force – I suppose it can also be said that we have a contribution to make to the "practicability" of legislation. I say "suppose": I know that there is a weighty body of professional opinion in the discipline that it is part of the law drafting function to query whether a bill is practical. Nevertheless, it does seem to me that it is important to be clear as to what we profess in that respect – by reason of being legislative counsel, anyway – and that it is just as important not to overstate it.

The art in law drafting was to my mind put very succinctly in an advertisement in the Times some years ago for Parliamentary Counsel in London. It is to analyse, clarify and express legislative propositions. That is certainly business for counsel. By itself, and properly understood, it is surely in very ample measure business of counsel. It requires intellectual ability, creativity, knowledge of the law, critical appraisal and judgment. There is no need to go further to seek to justify our professional function.

In contrast, I think it is a moot point whether by reason of practising as legislative counsel, or even as lawyers, we have any special insight into the practicability of proposals for legislation, beyond those arising from our familiarity with the kinds of machinery provisions I have mentioned.

For example, the political mood in a country may for the time being favour "deregulation", such as reducing or avoiding the statutory prescription of forms. As long as that mood prevails, legislative counsel will be aware of it, and is likely to invite a client department to consider proceeding accordingly. That isn't taking an initiative on the practicability of legislation, though. It may for the time being be seen politically as a better approach to public administration, but counsel is doing no more than to draw attention to the received wisdom of the moment. Likewise, by explaining to an instructing officer that a licensing regime or an appeal system is often set up in a certain way, counsel is not alerting the client department to practicalities, only to precedent. In most cases, I think that the truth of the matter is that counsel probably has little or no experience of the way in which such a scheme actually works on the ground. If a particular person happens to be informed, for instance, about the costs involved in a particular licensing arrangement, that is coincidental rather than anything that flows from his professional expertise. Again, all counsel is doing is to direct the department's attention to the way or ways in which, for better or worse, other legislation has been enacted.

We often compromise on our drafting instructions, for what we regard as constructive motives. We accept inadequate instructions and proceed on them, taking it upon ourselves to assume to a greater or lesser extent the functions of an instructing officer. We do so, despite our own lack of competence, in circumstances in which the instructing officer has failed to demonstrate that he himself knows the reasons for a legislative proposal and its objectives.

The likelihood of a result that is less than satisfactory must be fairly high. There is no legislative "audit trail", so identifying the objects that a bill is intended to achieve and the reasons for going about it in the way that is proposed is bound to be to some extent a chance affair. In seeking to do so, counsel will inevitably be distracted to a greater or lesser degree from his or her professional functions of analysis, clarification and composition. And the lack of any real engagement between the instructing officer and counsel deprives the exercise of one of the most important steps in the process of preparing and polishing legislation – the vigorous, ongoing dialogue that should take place between them, by which each scrutinizes and comments critically on the instructions or the drafts of the other as they stand for the time being.

Pragmatic drafters may say "That's all very well in theory, but law drafting is an applied discipline, not an abstract one. If we don't take an initiative, how will the job get done?" It is a point of view that few legislative counsel at work in small countries will disparage. Legislation, as we all know, is usually a matter of political priority. Delays cause chain reactions of tension within an administration. Ministers feel frustrated and departmental officers may become defensive. Most people tend, for understandable reasons, to regard "law drafting" as coextensive with the preparation of legislation. Everyone looks

towards legislative counsel for assistance, and for a result. In such an environment, he or she may be constitutionally inclined to get on with it.

Yet is there not a need for a better approach? A bill is one detail of a greater project. Ordinarily, it will be an essential feature of it and may have taken up considerable time and work along the way. Its conception, planning, passage and subsequent implementation – and the bigger project of which it is one part – will nevertheless involve many other matters of administrative decision-making and judgment, and skills, that no one would seriously suggest as falling within our competence. In practice, legislative counsel is seldom involved in the early stages of policy-making. We never participate in the aftermath of the approval and enactment of a bill – the staff planning and training, the logistical arrangements, and the ongoing administration of the Act we have drafted. When legislative counsel attempts the work of an instructing officer one part of the larger project is being dealt with, eccentrically, in isolation. Quite apart from issues of general administrative experience and expertise, it seems to me that this raises a question of adequate coordination.

We are not wordsmiths. But nor are we administrators. We are specialist legal counsel. The problem is not one of law. It is a matter of administrative resources, and it needs to be addressed accordingly. I don't believe it is insurmountable. As law drafting offices, we have a part to play in dealing with it. However, the solution requires something more than our issuing handbooks or procuring government standing orders as to the steps to be followed in preparing legislation. They may have their place procedurally, but they do not get to the nub of the problem. So far as they may attempt to prescribe how drafting instructions are to be prepared, I think they are inappropriate and may be counterproductive. The way forward, I suggest, lies instead in engaging in dialogue with senior politicians and senior officials. We need to explain to them the elements involved in the preparation of legislation. We might perhaps advert dispassionately to the fact that the delivery of the legislation programme is generally considered as a matter of political importance. The aim should be to convince them - ministers, and senior officials at the highest level - of the need to complement the resources that they have committed to law drafting with corresponding administrative resources.

The Role of Legislative Counsel: Wordsmith or Counsel? [2][1]

***Stephen Laws*[2]**

No wordsmith worth his salt would address this question without seeking to analyse and define each of the terms in the question — and for me the most important, or at least the most contentious, is the "or". For, at the risk of spoiling the suspense, I have to say at the very start that so far as legislative drafters for the UK Parliament are concerned, my answer to this is an emphatic "Both".

Before I explain why I think this is the case, however, I do need to say something about what I think is meant by the contrast the question poses. What does a counsel do that a mere wordsmith does not?

Well I take a wordsmith to be someone who works just with words and holds back from considering the substance of what they express. So a drafter who is just a wordsmith would take the words of his instructions and translate them into legal propositions that were concisely and accurately expressed. But he would accept no responsibility for the content. A counsel however would be someone who tenders advice, who provides his clients with assistance, and even direction and leadership. He or she would provide more than a mere technical service of producing a legislative text.

But I do not want to analyse the idea of a wordsmith in such a narrow way as to make the question too easy to answer. I do not want or need to confine the idea of a wordsmith to a pedant, someone like Mr. Noah Webster the American lexicographer, who, as legend has it, was found by his wife embracing the chambermaid. "Mr. Webster", she said "I am surprised". "No, my dear", he replied, "You are amazed. We are surprised."

So when I talk of the translation of instructions, I am conscious that "translation" is itself a slippery concept. In the UK there has been some discussion recently of the need for the "translation" of

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1 Stephen Laws was unable to attend the CALC Conference held in Nairobi in 2009, so this paper was presented by Edward Stell on his behalf. Edward is a Parliamentary Counsel in the Office of Parliamentary Counsel in London.

2 First Parliamentary Counsel, United Kingdom

legislative text into "plain language", in circumstances where what I think is clearly meant is the translation of the legislative text into a different context in which the text can be supplemented by explanatory material that has the effect of rendering the text more easily understood.

I do not know how many of you are familiar with the book of lectures by Umberto Eco "Mouse or Rat – translation as negotiation".

In those essays Eco distinguishes true translation from transliteration. In transliteration the words in the source language are simply reproduced in the target language and rearranged into the appropriate syntax. By contrast, true translation, he says, involves a degree of "negotiation", in which the translator has to choose the elements of the original text that are capable of being reproduced in the target language in a way that retains the same literary flavour as the original. But the translator has to negotiate the different structures and components of the two languages – just, I say, as the drafter has to negotiate the differences between the language of policy formulation and the language of the statute book.

To illustrate the point Eco contrasts the translation into Italian of "rat" in the First Chapter of Camus' "the Plague" (La Peste") with Hamlet's words on being surprised by a movement behind the arrras, which are followed by his lethal attack on the hidden Polonius: "How now, a rat".

The problem is that, although Italian has both the words "topo" for mouse and "ratto" for rat, the word "topo" is used in everyday usage for both a mouse and a rat, while "ratto" is used only in technical texts. Moreover "ratto" has none of the English connotations of betrayal. Instead it suggests something speedy – "ratto" is slang for speedy. The translator has to decide whether it is possible or appropriate to keep the connotation of betrayal in Hamlet's exclamation or to confine himself to the correct word "topo" for a rodent that has caused a surprise. If he decides to use extra words to express the concept of betrayal, the translator necessarily produces an allusion that has an extra emphasis that is lacking in the English. In "the Plague", however, the connotation that comes with the reference to a rat is one of a rodent that creates apprehension, as a potential carrier of disease. This can be achieved by saying "grosso topo"; "topo" alone would fail to do that. The addition of "grosso" ensures that the reader understands the reference as a reference to a rodent that is big enough to suggest a threat.

All this reminds me of Richard Hyland's3 assertion that "Legal writing is one of those rare creatures, like the rat and the cockroach, that would attract little sympathy, even as an endangered species". I shall just pause for a moment as we all think about the translation into Italian of the word "rat" in that quotation. I am certainly not, of course, when I talk about translation, talking about translation into any special legal language.

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[3] Prof Law Rutgers Law School - *A defense of legal writing* in 1986 U PA L Rev

So, accepting for the purposes of today's question this analysis of a broader meaning for translation, I can see that there can be an element of "negotiation" and also of "interpretation" in even a mere wordsmith's translation of instructions into law. Even a mere wordsmith has to be an expert in making sense of his instructions, of perceiving the legal content of what he is asked to do and of analysing it and negotiating the elements of the instructions that need to appear in the text. The wordsmith also has to arrange the material and structure it so that it retains, so far as possible, the same policy message as the instructions. And for this purpose I do not make any distinction between those who receive their instructions, as we do in the UK, in the form of a narrative description of what is wanted and those who receive instructions in the form of a draft.

Wordsmithing in this sense is highly skilled and technical work. Drafters for the UK Parliament have to acquire high levels of expertise in it. For that reason I do not want to say we are not wordsmiths. We are, and we should be proud of the fact that we are. But it is not all we are expected to be. We all know how important words are. It was Wyndham Lewis who said "Liberty is manufactured with words. All our struggles are about words, for no one would fight for reality, since without a name no one would recognise it."

But it seems to me that we in the UK do more than traffic in words.

So what is the work of a member of the Parliamentary Counsel Office in London that makes him or her more than a wordsmith? I shall stop saying "mere" wordsmith now. That is inappropriate.

Well, the first thing to say is that there is no fixed definition of what UK departments expect of Parliamentary Counsel; and attempts to set one out inevitably result in a plethora of exceptions. Requirements have changed considerably over time and indeed change from Bill to Bill today.

I think there can be little doubt what was required in the case of Sir Henry Thring (the first drafter to hold the office of Parliamentary Counsel, the office – in the appointment sense – from which our present Office – in the collective sense – derives). When he sat down to breakfast with Gladstone to discuss the Bill that the PM required, he acted as Counsel and gave advice on policy, and not just words.

On the other hand, when our Office was severely understaffed in the late eighties and early nineties and came under more and more pressure to produce Bills in quantity and at excessive speed, we did develop the habit of demanding that our instructions reached a level of perfection that allowed us to confine ourselves to the wordsmithing—which was all we had time for. That reminds me of the only decent definition of a final draft. "The one produced the night before it is due." Of course a requirement of perfect instructions is a position that it is easy to move to and hard to move away from, because no drafter wishes to acknowledge, or should, that there is any progress in accepting instructions that are less than perfect. Nevertheless, the ambition is quite impracticable. So, in the real world, we have always had to cope (at least from time to time) with instructions that are less than perfect and were prepared before the policy has been fully settled, and, I suspect, that we always shall. And this means we

inevitably become part of the process of finalising the policy – and that our advice is often sought on different options.

In this connection, I want to set the role of the UK drafter in context: because there are a number of factors in that context that seem to me to enhance our role as counsel, as well as wordsmith.

The first is seniority. Even the most junior drafter on a team of two or three drafters in a UK drafting team is likely, just in terms of Civil Service pay grade, to outrank almost everyone else who is working (at least on a day to day basis) on the departmental Bill team, and the senior drafter will never be outranked. We live in more egalitarian and less hierarchical times, and are reminded frequently in our dealings with our customers and the outside world that the age of deference is dead – not something I personally regret. But there is little doubt that departmental Bill teams do look to the drafter for a degree of leadership in carrying forward a Bill project.

So it is not uncommon for the drafter to take it upon himself to alert the department to common traps in the handling of the project and generally to volunteer to provide informal and sometimes formal training on Bill work. It is increasingly common too for drafters to be involved in the project planning for a Bill. And that is desirable. There is nothing more frustrating, in my experience, than to be presented, too late in the day to be able do anything about it, with a project plan for a Bill that allows six months for policy development, two more months for instructing departmental lawyers to prepare instructions for Parliamentary Counsel and two weeks for the drafter to prepare the Legislation Committee print of the Bill from those instructions.

And the second thing that is relevant to our wider role is that, even more than in the past, civil servants in UK departments move frequently from job to job and are expected to build up experience in all three areas of civil service activity: policy development, operational delivery and corporate services. It is common to be instructed by a team for most of whom, the Bill will be their first experience of Bill work, and may also be their last. This will almost certainly be the case when the instructions come from a department other than one of the big serial legislators. The team of drafters often contains much the largest fund of legislative experience. So it is common for the departmental team to look to the drafter to be their guide through both the Parliamentary process and the processes within Government for legislating (L committee, departmental and external consultation, dealing with the parts of the UK that have devolved administrations, and so on). Parliamentary Counsel becomes the department's pilot through unfamiliar waters.

Another feature of this is that Bills are often seen now in departments as part of wider policy delivery projects; and their Bill teams are now usually led by non-lawyers, who are interested in a whole range of issues including consultation, and eventual implementation. This is generally a good thing; but it leaves the drafter as the specialist in management of the Bill part of the project.

Another thing that contributes to UK drafters' role as counsel is their professional independence. I do not want this to be misunderstood. UK drafters are organisationally firmly within the Civil Service and,

as such they are constitutionally accountable to Ministers alone. Like all civil servants they are subject to the Civil Service code and therefore subject to obligations of "integrity", "honesty", "objectivity" and "impartiality", but they owe no separate obligations to Parliament or to anyone outside Government. Nevertheless, we are professionals with professional standards and we are not officials of the instructing departments – rather we are a central service who can stand outside the policy making process and bring a degree of objectivity to the analysis of what it has produced.

It is this aspect of the role that is perhaps the area of greatest controversy, and the area where it is most difficult to distinguish between the role of counsel and wordsmith (in the extended sense I have already explained). Increasingly drafters are asked to make a positive as well as a critical contribution to the formulation of policy. It is not, if it ever was, acceptable to demonstrate that a set of instructions is analytically incoherent and then to sit back and wait for a better set. Those who detect problems are expected to act like team members and to contribute to finding the solution. This includes the drafter. But where do you draw the line? Lawyers in general, and drafters in particular, do not generally make good policy makers, partly because they concentrate on possibilities rather than on an evidenced-based analysis of what happens in practice.

However there is another element of our independence which undoubtedly gives us the role of counsel, rather than wordsmith. We have a function in the system of being advocates for the protection of the integrity of the statute book, and to ensure that there is no debasement of the currency of the means by which Parliament communicates with the courts.

This involves two things, and matters of substance as well as words. First, it involves fearlessly alerting Ministers to the risks of allowing short term considerations to undermine the respect the courts give to Parliamentary proceedings. The reputation of the Office and the quality of its work is one of the things that ensures that the balance is kept between the principle of Parliamentary sovereignty and the temptation for the courts to make new law to deal with hard cases. It is this that makes UK drafters so reluctant to accept unnecessary material in statutes.

Secondly, our independent role means it is the function of the Parliamentary Counsel to draw to Ministers' attention, and particularly to the attention of the Law Officers (who have a general oversight of legal policy questions), anything in a Bill that offends constitutional principle. In those jurisdictions where there are written constitutions and it is a function of the drafters to warrant the constitutionality of the legislation they draft, it seems to me unarguable that, in that function at least, the drafters act as counsel not wordsmiths. But, even in the UK, the practical need, if policy is to be effectively implemented, of ensuring that Bills conform to the rule of law, and the relatively recent statutory rule that requires Bills to be construed in accordance with the European Convention on Human Rights, mean that Parliamentary Counsel in the UK have a legal and constitutional input to the drafting of Bills, even in the absence of a written constitution.

I should mention one limitation on our role as counsel. The UK is a large jurisdiction and we are instructed by departmental lawyers who are expected to provide us with the detailed legal background to

the changes we are being asked to make. We expect our instructions to seek to identify consequential amendments, transitional provisions and any other supplementary provisions that need to be made. So to that extent, it seems to me that we do not perform the role that some drafters in smaller jurisdictions have to perform: of instructing themselves on incidental matters.

But there is one further matter that I need to address because it is another area in which the UK drafter undoubtedly acts as counsel rather than wordsmith and that is the role of Parliamentary Counsel in the legislative process. In some jurisdictions the legislature rarely amend Bills introduced by the executive. In others the Government drafter becomes functus officio once the Bill has been introduced.

Neither of those is the case in the UK. In recent years the House of Lords has been very active and members there have been successful in moving amendments against the Government. And even in the Commons the impression of a Government steam roller is in many respects an illusion. Unlike in the Lords, the Government does control both the timetable and a majority in the Commons, but that is only half the story. Behind the scenes the process of consultation and the reality of discreet back-bench pressure is constantly making the Government consider the case for concessions. The pressure of a large legislative programme in a world in which Parliamentary time has a finite limit, quite apart from its own commitment to the democratic process, requires the Government to seek to achieve consensus in its Bills so far as it possibly can. And we almost invariably draft the amendments that give effect to any eventual compromise.

What role do Parliamentary Counsel play at this stage? Often it is very different from the role played in preparing the Bill for introduction. There the correct and proper approach for the drafter is the austere one of finding out exactly what the department want and giving effect to it. When it comes to drafting amendments to achieve consensus, however, the task is more subtle, and it requires judgement and professional expertise that go beyond the task of finding words for others. It is often the drafter alone who can identify the change that can satisfy the parties and not compromise the integrity of the Bill, or of the statute book generally. Perhaps a case can be made for saying that this is a form of wordsmithery as I have defined it; but for my money it involves much more participation in the substance, and so is properly described as "counsel's" work.

I hope that gives an insight into the role of the UK drafter that justifies the conclusion I began with. We are both wordsmiths and counsel.

Delegation by Parliament of its legislative powers: a South African perspective

Deon Rudman[1]

Introduction

The aim of my presentation is to give a SA perspective on the drafting of enabling provisions in Acts of Parliament and to remind ourselves of the importance of these provisions. I will then also examine Parliament's supervisory role relating to subordinate legislation and make a few recommendations for reform.

The constitution and the delegation of legislative power

In dealing with the topic of delegation of its legislative powers by Parliament, one can only do so with reference to our Constitution. South Africa has moved from a system of Parliamentary sovereignty or supremacy to one of constitutional supremacy.

Section 2 of the Constitution provides as follows:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the Executive and all organs of state.

Parliament, which consists of the National Assembly and the National Council of Provinces, is the legislative authority in the national sphere of government. There are also nine provincial legislatures and a large number of municipal councils, all of which have legislative authority. The Constitution provides for the scope of the legislative powers of these legislative bodies which are all democratically elected and deliberative legislative bodies and their legislation is original as opposed to subordinate legislation.

Since the Constitution is the supreme law in South Africa, these legislative bodies are all subject to the Constitution and, therefore, their legislation can be scrutinised by the Constitutional Court, the Supreme

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Court of Appeal and the High Courts. The supremacy of the Constitution in relation to the legislatures is twofold:

- Their legislative power is subject to the Constitution, which emphasises the dominance of the provisions of the Constitution over Parliament's legislative power; and
- laws have to be made in accordance with the Constitution.

The Constitution does not expressly provide for delegation by these legislative bodies of their legislative powers. Neither does it prohibit such delegation. However, there is recognition for such delegation in the Constitution. But what about the doctrine of separation of powers which is one of the cornerstones of our Constitution? This principle is, inter alia, reflected in the structures and the affairs of our government namely the legislative branch, the executive branch and the Judiciary. In South Africa the separation of powers is not complete or absolute. The Constitutional Court has rejected the idea of a rigid separation of powers and has recognised some degree of overlap between the respective functional spheres of the legislatures, the Executive and the Judiciary and has also recognised a degree of interdependence. South Africa's recent constitutional jurisprudence regarding the principle of separation of powers has left the door open for Parliament to continue its practice of delegating its legislative powers, albeit in a different manner.

A number of decisions of the Constitutional Court have made it clear that delegation by Parliament of its legislative powers is constitutional.

However, Parliament is now also subject to the Constitution and its legislation can be tested by our courts. Parliament has to act within certain parameters. An important case in this regard is that of the *JCouncil, Western Cape Legislature* which was decided under the Interim Constitution. In this case, section 16A of the *Local Government Transition Act 209 of 1993*, empowering the President to amend the said Act and its Schedules by Proclamation in the *Gazette*, was found to be invalid because of an unconstitutional delegation of legislative power. The case is important for a number of reasons. The Court made it clear that there is a difference between—

- "delegating authority to make subordinate legislation within the framework of the statute under which the delegation is made, and
- assigning plenary legislative power to another body, including, as s 16A did, the power to amend the Act ..." (which is not allowed under the South African Constitution).

The court referred to the law as it has developed in other countries and came to the conclusion that where Parliament is established under a written Constitution, the nature and extent of its power to delegate legislative powers to the Executive depends ultimately on the language of the Constitution, construed in the light of the country's own history. In our case, it is a history of breaking away from Parliamentary Sovereignty. The case is also important as it refers to the following tests which may indicate that plenary legislative power has been assigned:

- The power to exercise a discretion as to what the law shall be, as opposed to a discretion as to the execution of the law.

- Does the delegation entail more than the mere giving effect to principles and policies contained in the statute itself?

A second limitation on the delegation by Parliament of its legislative powers has been identified, namely the extent to which delegated legislation will interfere with Parliament's distinctive functions and duties. The Constitutional Court held that section 24 of the *Local Government: Municipal Structures Act 117 of 1998* was unconstitutional because it delegated to the Minister for Provincial Affairs and Constitutional Development the authority to determine, by Notice in the *Gazette*, the term of office of municipal councils whilst section 159(1) of the Constitution requires the said term to be determined by national legislation. The reasoning is that the term of office of the municipal councils (an elected legislative body) is a crucial aspect of the functioning of the council and section 159 is intended to protect a democratic political process against interference by the Executive.

The position is still that Acts of Parliament are in the form of "framework" legislation and the statutory flesh on the structures and scheme is added by means of subordinate legislation. The view has been expressed that law-making is the domain of the legislature and should not be delegated excessively to the executive branch of government.

The South African Constitution prescribes the values of the Republic, one of which is the supremacy both of the Constitution and the rule of law. In view of this, the South African Constitutional Court will most probably scrutinise legislative instruments vigorously so as to ensure that legislation meets the requirements relating to the principle of legality, which forms part of the rule of law. The powers delegated to the Executive may also have serious consequences in the application of the doctrine of *ultra vires*. Parliament and legislative drafters should therefore rather include express provisions authorising the subordinate legislation and draft these provisions in a manner that the recipient of the power has in fact full power to make legislation on all matters for which it may be needed.

Section 8 of the South African Constitution, which deals with the application of the Bill of Rights, provides that the Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of state. This issue has already been covered by my colleague, Enver Daniels and he also drew your attention to the rights that are enshrined in our Bill of Rights. Section 36 of the Constitution, as he indicated, is also part of the Bill of Rights and provides for the limitation of the rights in the Bill of Rights. If Parliament therefore delegates its legislative power it should be borne in mind that, in exercising such delegation, regard will have to be had to the Bill of Rights.

Frequency, nature and extent of delegation

The circumstances necessitating the delegation by Parliament of its legislative powers include limited Parliamentary time. As South Africa is still considered a young democracy, the position of our Parliament might be a little different from that of other jurisdictions in the Commonwealth. In terms of an audit done relating to the obligations of Parliament contained in approximately 282 statutes, e.g. law-making, oversight, appointment of office bearers and forging links with the public, it is evident that Parliament is hard pressed to attend to its obligations. Since society has become very complex and we have to cope with a highly technical and rapid changing environment, Parliament is also inundated with

Bills of a very technical nature or Bills requiring inputs of a highly technical nature; hence the need for the delegation of legislative powers.

An analysis of the legislation passed by Parliament during the period 2004 to 2006 reveals that Parliament generously delegates its legislative powers to the Executive.

I now turn to the recipients of delegated legislative powers. It is common practice to delegate legislative powers to the Executive, namely Cabinet Ministers or the head of the Executive, in our case the President and to statutory bodies. An interesting case in South Africa, in this regard, is the *Mpumalanga Petitions Bill* case. The *Mpumalanga Petitions Bill, 2000* provided for the Speaker of the legislature to make regulations relating to the implementation of the Act and to determine the date of its commencement. The Premier referred the question of the constitutionality of the Bill to the Constitutional Court. The Court held that the Constitution does not limit regulation-making to members of the Executive, nor does the Constitution limit the delegation of legislative powers to the Executive. Referring to the factors that ought to be considered when determining the appropriateness of the delegation of a law-making power, the Court held that—

> "since the proposed legislation related to petitions to the legislature, giving substance to the legislature's oversight responsibility of the Executive and to facilitate public involvement in the legislative and other processes of the legislature; and
>
> since the Bill, once it becomes a provincial Act, would be implemented by the provincial legislature, including the Speaker, and not by the provincial Executive, it would be inappropriate for the Executive to regulate the former function, and wholly appropriate for the legislature to regulate both functions itself through its Speaker who, by virtue of his or her office had the necessary expertise and was fully accountable to the legislature."

Another interesting example is to be found in the *Public Audit Act 25 of 2004* in terms of which the *Auditor General may make regulations pertaining* to any *matter to facilitate the application of the said Act.* The Auditor-General must, in terms of this legislation, after consultation with an oversight mechanism, which is to be provided by the National Assembly, submit any regulations made to the Speaker for tabling in the National Assembly. In addition, the Auditor-General must annually submit a report to the National Assembly on his or her activities and the performance of his or her functions.

Having regard to the views of the Constitutional Court in the *Mpumalanga Petitions Bill*-case, it appears as if the Auditor-General will also be responsible for the implementation of certain sections and the Auditor-General will also be subject to certain sections of the Act. There is also the aspect of accountability to the National Assembly both in respect of the regulations made and regarding the activities and performance of his or her functions.

I now wish to make a number of observations in regard to the *extent* to which Parliament delegates its legislative powers:

> *My first observation*—The question arises as to how Parliament has dealt with policy matters and substantive issues and has Parliament, on occasion, delegated legislative powers to the executive that can be regarded as policy. I will answer this question by referring to a few examples:

- In terms of the *National Gambling Act, 2004*, the Minister may make regulations regarding the maximum number of any kind of licence, relating to gambling, to be granted in the Republic or in each province, subject to section 45. Section 45 sets out the criteria to be taken into account in determining the maximum number, thus guiding the Executive in the exercise of a discretion that might be regarded as a policy matter and which has serious implications for members of society.

  The Finance Services Ombud Scheme Act 37 of 2004 provides that the Minister may—

  (a) make regulations regarding the limitations on the jurisdiction of the statutory ombud, but

  (b) simultaneously provides for factors to be taken into account in limiting the jurisdiction.

  An Act of Parliament which creates a new scheme should contain the principles and policies. It can therefore be argued that a matter relating to limitations to the jurisdiction of a statutory ombud should be dealt with in the Act. In this instance, Parliament has empowered the Minister to regulate this matter but has once again put in place criteria to take into account when exercising the discretion.

(c) The *Maintenance Act 99 of 1998* deals with, inter alia, applications for maintenance orders or the substitution of existing maintenance orders, the issuing of such orders and certain aspects relating to the execution thereof. The Act authorises the Minister for Justice and Constitutional Development to make regulations regarding the execution of maintenance orders. In analysing an execution process in general, one realises that such a process deals with executable property, property exempted from execution and the title of goods sold in execution, all of which are aspects normally regulated by an Act of Parliament. This might be an example where an enabling provision was drafted without having considered the entire process relating to execution. Hence it is very important that legislative drafters conceptualise the whole process before engaging in the drafting of the enabling provision.

(d) Another example of enabling provisions which might be too broad, are sections of the *Magistrates Act of 1993* which empower the Minister to make regulations –

  (aa) creating a structure and prescribing procedures in terms of which members of the public may report to such structure any alleged improper conduct on the part of a magistrate;

  (bb) determining the powers and functioning of the structure;

  (cc) the duties, powers, conduct and discipline of magistrates; and

  (dd) the legal liability of any magistrate in respect of any act done in terms of the Act.

These are matters which one normally would have expected to be regulated in the parent Act and not in subordinate legislation.

My second observation is that Parliament very often delegates general legislative powers or provides for "catch-all phrases" or "umbrella provisions". Although one might wonder to what extent this technique is used as a matter of course as opposed to really being required, South Africa is not unique in including a general legislative power in almost all Acts. There are many ways in which this is done, which might give rise to legal challenges regarding the manner in which the different formulations are to be interpreted. In analysing the general legislative powers contained in these Acts, one should be fully aware of the need to delegate legislative powers in broad terms so as to cater for scenarios not foreseen or anticipated in the drafting of the legislation. I have looked at various formulations and have come to the conclusion that, because some of these formulations allow for a subjective test, they will limit judicial review and for that reason are too wide. Let me refer to a few of these formulations:

(a) The Minister may make regulations not inconsistent with the Act concerning any matter which in the opinion of the Minister is necessary for the effective carrying out or furtherance of the objects of the Act.

(b) The Minister may make regulations regarding matters contemplated in certain sections of the Act, and, in general, regarding any incidental matter that may be considered necessary or expedient to prescribe in order to achieve the objects of the Act.

In this case it is clear that the general legislative power is limited to "any incidental matter" which only authorises the making of regulations relating to administrative and procedural matters and not regulations interfering with individual rights. The exercise of the power is not dependent on the subjective judgment of the delegate but will be tested objectively; it must be necessary or at least expedient, which has a much lower threshold.

(c) The Minister may make any regulation with regard to any matter that is, firstly, governed by the Act and, secondly, that is incidental to the objects or implementation of the Act. With reference to the power to make a regulation with regard to a matter that is governed by the Act, Parliament has not restricted the power only to the making of regulations of a procedural or administrative nature.

If every word in this provision is to be given a meaning, then this power must be different from the power to make regulations "incidental to the objects or implementation of the Act". One could also ask, what exactly does "governed by the Act" mean?

Legislative drafters *should* be aware that the use of different formulations makes interpretation difficult and, as far as possible, use uniform provisions.

I will, however, acknowledge that some of the general legislative powers might not be as wide as appears at first glance since one should be mindful of the relation between the parent Act and the legislation made under the delegation, namely that the latter should not be inconsistent with the former, and that the Act should be read as a whole. Secondly, if the *eiusdem generis rule*[2], is applied, the general legislative power will be limited.

My third observation—This is that the headings of the enabling provisions read differently. The following versions are used:

(a) The Minister may make regulations regarding /in regard to ……. .

(b) The Minister may make regulations relating to/ in relation to …. .

(c) The Minister may make regulations concerning ……. .

(d) The Minister may make regulations in respect of …. .

Are there any particular reasons for the different formulations and should we not try to adopt a uniform approach to limit legal challenges and to make it easier for the government officials advising *the* Executive regarding his or her delegated legislative powers.

My fourth observation—Parliament sometime obliges the Executive to make regulations and in other cases the Executive is allowed a discretion. There are also examples where, in the same Act, recipients of legislative powers are obliged to make regulations *relating* to particular aspects but has a discretion in respect of other matters. What is interesting to note, is that in some instances where a discretion has been given to the Executive, one finds an enabling provision reading as follows:

"The Minister may make regulations regarding –

(a) all matters which by this Act are required or permitted to be prescribed by the Minister; and

…".

The word "may' should actually then be read to mean "must" in so far as the matters which are in terms of the Act required to be prescribed. Should this be the case, why can the enabling provision not provide in one subsection for the aspects in respect of which regulations must be made and in another subsection for the aspects in respect of which the recipient has a discretion. This will ensure that the recipient has a clear understanding of what is expected of him or her.

[2] See Lady Justice Arden's paper *The impact of statutory interpretation on legislative drafting*, p. 4 above.

Parliamentary supervision

Parliamentary supervision is extremely important as section 43 of the Constitution places an obligation on Parliament to enact, amend and repeal rules of law. The principle of representation is one of the essential elements of a democratic system. The following quote is relevant in this regard:

> "As only the second Parliament in our young democracy it is incumbent upon this Parliament to put in place measures that will promote the development of an institution worthy of the vision held by those who coined the phrase: 'The People's Parliament.'"

In addition, the Constitution requires the National Assembly, which is one of the components of Parliament, to provide for mechanisms –

"(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of –

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state."

No modern state can be governed effectively without the legislature delegating some of its legislative powers to the Executive to make subordinate legislation. Having regard to Parliament's mandate, it is necessary that Parliament creates a legislative framework within which such delegated exercise of law-making takes place. That explains Parliament's mandate to monitor and regulate the use of the delegated law-making power by the Executive. In the paper I have provided statistical information relating to the different ways in which Parliament monitors the execution of delegated legislative powers.

The issue of Parliamentary scrutiny must be looked at from two angles:

- Legislative framework: What are the requirements or guidelines provided for in the South African Constitution, other legislation, the parent Act or, more specifically, the enabling provision?
- At the practical level, how is this role being carried out to ensure effective supervision?

The South African Constitution provides that proclamations, regulations and other instruments of subordinate legislation must be accessible to the public and that national legislation may specify the manner in which, and the extent to which, proclamations, regulations and other instruments of subordinate legislation must be tabled in Parliament and approved by Parliament.

The South African Interpretation Act provides for the *publication* in the Gazette of subordinate legislation including rules and regulations made by the President, a Minister or a Premier of a province. Hence individual Acts do not necessarily provide for this aspect.

The South African Interpretation Act also provides for the *tabling* in Parliament of subordinate legislation made by the President, a Minister or the Premier of a province after publication in Gazette. That is also why many Acts of Parliament do not contain a provision requiring tabling of subordinate

legislation. Parliament has furthermore issued guidelines in respect of the tabling of papers in Parliament which require that particulars of the number, date and title of the Proclamation or Government Notice and the number and date of the *Gazette* in which they were published, must be provided.

Tabling of subordinate legislation in Parliament is an important measure in order to foster and enhance Executive accountability and keep the legislature abreast of the subordinate legislation made under delegated legislative powers. How effective is this tabling requirement? All that is tabled in terms of the Interpretation Act is a list of the regulations and rules that have been made and not copies of the regulations or the rules. The portfolio committees of Parliament only deal with subordinate legislation which is placed before it through tabling. Should the Executive not comply with the Interpretation Act, Parliament will not necessarily know that subordinate legislation has been made. Because there is reason to believe that not all government departments adhere to the requirements for tabling subordinate legislation in Parliament, it might be advisable to explore the possibility of establishing links between Parliament and the Government Printer to provide for the electronic transfer of subordinate legislation so that the necessary supervision can take place.

Another way of ensuring accountability of the Executive in respect of subordinate legislation is to require in the parent Act that the subordinate legislation be submitted to Parliament *before* its publication in the *Gazette.* It would appear as if this type of provision has been used increasingly by Parliament after 1994. However, most of the legislation requiring the submission of subordinate legislation to Parliament before publication, simply requires that the subordinate legislation be submitted but it contains no further directions regarding timeframes and the powers of Parliament in regard thereto. This creates some uncertainty. A proper process needs to be followed and sufficient time must be allowed for Parliament to consider the legislation in order to ensure that the tabling serves a purpose.

To illustrate some of the difficulties experienced, I wish to refer to the following two different formulations relating to submission:

> Firstly, where an Act empowers the Executive to *make regulations by notice in the Gazette*, for instance in section 92 of the *Promotion of Access to Information Act, 2000*, which also requires submission to Parliament, the following process is followed: The Executive approves the subordinate legislation, whereafter the regulations are submitted to Parliament. If no response is received from Parliament after a reasonable period, it is assumed that Parliament has no comments and the regulations are then published in the Gazette. In passing I can mention that the heading of the regulations in this example will read as follows:
>
> > I, ……, Minister for …….. hereby under section ….. of the …… Act make the regulations in the Schedule (first person).
>
> The second example is somewhat more complex namely where the enabling provision only provides that the *Executive may make regulations without requiring that this be done by notice in the Gazette,* for instance in section 30 of the *Equality Act*. The Equality Act also requires that any regulation made under the Act must be tabled in Parliament 30 days before publication thereof in the Gazette. In practice, the Department responsible for the administration of the Equality Act will submit proposed regulations to the Minister. The Minister, if satisfied, will make the regulations

although they will only come into operation, at the earliest, on the date of publication in the *Gazette*. After Ministerial approval but before publication in the *Gazette*, the regulations will be submitted to Parliament for the 30 day period. After the expiry of the 30 days, the regulations will be published in the Gazette. As already indicated, there is some uncertainty as to exactly what Parliament can do in these circumstances since the regulations have already been made. And in this example, the heading will read as follows:

> The Minister of ……has in terms of section ….. made the regulations in the Schedule (third person).

In the first example, the regulations are submitted to Parliament before they are made and in the second example, they are submitted to Parliament after they have been made. This is all very confusing.

The third measure used by Parliament to exercise control is to require that subordinate legislation *must be approved by Parliament.* Having regard to the different reasons why legislative powers are delegated, it seems counterproductive to use a measure of this nature unless special circumstances exist. The parent Acts seldom prescribes procedures to be followed or the powers of Parliament, hence some sense of uncertainty as to what should be done.

In respect of 29 Acts enacted during 2004—2006, it can be mentioned that—

- in 2 Acts it is required that the regulations be tabled after publication in the Gazette; and
- in 3 Acts it is required that the regulations be tabled before publication in the Gazette.

Two of the three Acts relate to the 2010 FIFA World Cup legislation. This justifies a conclusion that Parliament uses these forms of scrutiny sparingly and only when appropriate.

Thus statutory provisions exist to ensure Parliamentary scrutiny. Nevertheless, reform is needed. One possibility is to ask the South African Law Reform Commission to include this matter in its review of the Interpretation Act.

Having dealt with the legislative framework, let me look at the practical manner in which Parliament exercises its supervisory function. In South Africa, unlike in some other Commonwealth countries, we do not have a permanent parliamentary mechanism, for example, a standing committee, to scrutinise subordinate legislation. This is done by the portfolio committees established by the Speaker of the National Assembly with the concurrence of the Rules Committee of the National Assembly. These Committees have become the engine room of Parliament since 1994 which may initiate and prepare legislation but must also analyse and consider bills submitted to them by Cabinet. They have very busy schedules and their time is limited. Consequently, scrutiny of subordinate legislation cannot always be done speedily. Furthermore, as far as could be ascertained, the portfolio committees do not have prescribed criteria, except for the Constitution and other relevant legislation, against which they measure or test the subordinate legislation. Scrutiny of subordinate legislation furthermore might in some cases require expertise which is not necessarily available in all portfolio committees. As far as could be ascertained, there are also no procedures designed to facilitate reporting by the portfolio committees.

It is true that there are various Subcommittees on Delegated Legislation. However, their functions are to investigate and make recommendations to the Rules Committee on possible mechanisms that could be

used by legislators to maintain oversight of the exercise of legislative powers delegated to the Executive. They do not attend to the actual scrutinising of subordinate legislation. They have, for example, considered the report of a consultant appointed to conduct research relating to Parliaments oversight and accountability with a view to practically improving existing mechanisms of oversight and to identify areas where oversight mechanisms were required to be put in place.

Having looked at the systems and mechanisms of other jurisdictions relating to Parliamentary scrutiny, it appears that the following is crucial for effective scrutiny:

(a) Scrutiny must be done in a formal and structured manner;

(b) mechanisms or structures must be put in place;

(c) appropriate procedures must be established;

(d) proper record management is required;

(e) Parliament requires sufficient capacity to carry out its supervisory task;

(f) formal reporting by Parliament to the Executive; and

(g) guidelines or terms of reference for the structures involved in the scrutiny process.

Parliament is fully aware of the fact that the scrutiny process is in need of reform. Hence it mandated an investigation regarding Parliament's functions relating to oversight and accountability and requested that a Legislative Landscape Study be conducted. The Ad Hoc Joint Committee on Oversight and Accountability issued a final report which has been made available for comments. Having regard to the content of the report in general and the recommendations made, there is confirmation for the view that there is room for improvement.

Other safety mechanisms

The size and operation of modern government makes it difficult for legislatures to scrutinise all government activities, including the making of subordinate legislation, effectively. Therefore, part of the oversight function must be to ensure that there are adequate alternative mechanisms in place so that problems can be addressed. An alternative safety measure often used by Parliament where legislative power has been delegated to a statutory body, is the requirement that subordinate legislation be made under the aegis or approval of the Minister responsible for the administration of the parent Act.

Another important measure is mandatory consultation with interested parties and affected persons. There are many examples of Acts of Parliament requiring consultation. In most cases, it is required that consultation should take place without requiring that there must be agreement on the regulations. It is especially in instances where the legislative power is to be exercised *in consultation with* another body or functionary, which means that the parties should agree, that irrational or arbitrary conduct can be prevented. After 1994, there seems to be an increase in the number of Acts requiring consultation, most probably due to the underlying constitutional values of accountability, transparency and participation. Let me offer some statistics regarding consultation required by referring to the 29 Acts that I have already mentioned:

- In 13 Acts consultation is required.
- In 11 Acts publication of the draft instrument with a view to inviting comment is required.

There are some interesting developments taking place in South Africa in respect of consultation. The *Promotion of Administrative Justice Act of 2000* deals with administrative action affecting the public and provides that where an administrative action materially and adversely affects the rights of the public, then consultation must take place, for instance through a public inquiry or by following a notice and comment procedure. This Act emanates from the Constitution which guarantees the right to just administrative action. A recent Constitutional Court case in which the question as to whether the making of subordinate legislation constitutes an administrative action, was dealt with, is the New Clicks-case. In this case three different views about the applicability of the Act were expressed, none of which attracts majority support:

- The first being that the Act applies to all instances of subordinate legislation – both the law-making procedure and its substance;
- Secondly, whether the Act applies to a particular instance of delegated law-making depends on whether the exercise of powers granted by a particular statute constitute administrative action within the meaning of the Constitution and whether the Act then excludes the particular power from its scope;
- Lastly, the Act does not apply to subordinate legislation.

This case has given much food for thought as to consultation prior to the making of subordinate legislation.

There is increasing pressure to improve the business environment by reducing costs and other impediments. Hence an increasing demand that regulations be effective and efficient. The Presidency and the National Treasury of South Africa has recently conducted an investigation on the Possibilities for Regulatory Impact Analysis (RIA) in South Africa. Draft Guidelines have been developed, the idea being that all regulatory proposals made at the national level, whether they take the form of draft primary or secondary legislation, are potentially subject to RIA. The draft guidelines are still in the process of being finalised. The RIA requires not only consultation but also the generating of different options and the evaluation thereof against set criteria. The purpose is to put in place effective but affordable regulatory measures. The South African Minister of Finance has recently required that a RIA be conducted, in line with the draft guidelines, in respect of draft regulations relating to the promotion of equality to be made under section 30 of the Equality Act, an indication of how serious Government is with this initiative. This initiative is in line with measures adopted by other jurisdictions, for example the United Kingdom. The application of RIA will most definitely prevent the development of ineffective and expensive regulatory measures which have a negative impact on the economic growth and development in South Africa. It will also assist Parliament with its scrutiny function.

Another way of monitoring the exercise of delegated legislative powers by the Executive, is, in my view, through sunset clauses which, in general, refer to a system of periodic review of subordinate legislation to ensure that it is still applicable. The Department of Justice and Constitutional Development has requested the South African Law Reform Commission to consider the sunsetting of subordinate

legislation as part of its investigation relating to the review of the *Interpretation Act*. The Commission has consequently investigated this matter. A draft report is presently being compiled. Should this reform be accepted and implemented, South Africa would be on par with some other countries which have introduced sunsetting clauses in their legislation. Should we go this route, capacity will have to be created to do the required review.

Conclusion

In my view it would be fair to conclude that the state of subordinate legislation in South Africa calls for reform. The following

- In the first place, legislative intervention is required to, inter alia, deal with problems relating to tabling of subordinate legislation in Parliament, before or after publication but also in regard to approval and disapproval of such legislation.
- The finalisation of the investigation relating to oversight and accountability of Parliament is of primary importance so as to ensure proper mechanisms and standards for review.
- The idea of a central register for all subordinate legislation should also receive attention. Similarly, to enable Parliament to effectively monitor the content of subordinate legislation, consideration should be given to creating a register of all legislation that delegates legislative powers.
- Furthermore, Parliament should, when scrutinising subordinate legislation, also review the enabling provision.
- Legislative drafters must be extremely careful when drafting enabling provisions and all the aspects that I have referred to should be considered.
- A detailed manual should be compiled indicating how enabling provisions should be drafted to ensure uniformity, where appropriate.

CALC 2009—"Whose law is it?"

The next CALC Conference and CALC general meeting will be held in Hong Kong from 1 to 4 April 2009 (Wednesday to Saturday). The theme of the Conference will be "Whose law is it?" This is designed to cover a range of matters relating to legislation and legislative drafting. For example, how do drafters ensure that legislation is effective, consistent with legal principles and relevant rights based legislation? To what extent is legislation able to withstand judicial and (in the case of delegated legislation) parliamentary scrutiny? How can we ensure that legislation is clear to all those engaged by it, whether as legislator or user? The theme would also cover accessibility.

The Conference will begin with a reception on the evening of 1 April 2009 at the Hong Kong Club in Central. The main business sessions of the Conference will be held on 2nd and 3rd April 2009 at the Hong Kong Police Headquarters in Wanchai. A CALC conference dinner will be held on the evening of 3rd April 2009 at the Jumbo Kingdom, a floating restaurant in Aberdeen. All these venues are on Hong Kong Island. The registration fees for the conference are 188 (approximately C$380, AUD$390, or NZD$500).

A range of optional social activities will also be available. You may join a harbour tour or a tour at the Peak on the evening of 2 April 2009 for the famous view from the Victoria Harbour or the magnificent Hong Kong night view from the Peak. Also, you may join a one-day trip to Macau, a city adjacent to Hong Kong, on 4 April 2009 to enjoy a heritage tour around Macau and try, if you wish, your luck at a large casino. Moreover, a hiking trip on Hong Kong Island and a trip to Lamma Island together with a seafood lunch will be organised on 5 April 2009. You can enjoy these optional activities at an additional yet *very* reasonable cost.

Your contribution to the main business sessions of the Conference is now invited. If you wish to be on the conference program, whether as a presenter or a panellist, please contact the President, Eamonn Moran, or the Secretary, Dr Duncan Berry, at the following e-mail addresses by 30 September 2008:

Eamonn Moran, President	eamonnmoran@doj.gov.hk
Dr Duncan Berry, Secretary	dr_duncan_berry@yahoo.co.uk

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Northern Ireland
CIVIL SERVICE

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LEGISLATIVE COUNSEL (GRADE 5) OFFICE OF THE LEGISLATIVE COUNSEL

REF: SC/7/08

SALARY: £56,100 - £78,540 (under review)

LOCATION: Greater Belfast

DEPARTMENT: Office of the First Minister & deputy First Minister

A secondment arrangement may be considered.

Legislative Counsel are a specialised team of lawyers based in Parliament Buildings, Stormont. Their main task is drafting Bills for the Northern Ireland Executive for introduction into the Northern Ireland Assembly. They also work with Parliamentary Counsel in Whitehall to ensure the correct application to Northern Ireland of Westminster Bills.

With the restoration of devolution, this Office faces great challenges in meeting the demand for primary legislation. The person who fills this post will be expected to play a leading role in delivering the Executive's legislative programme.

Applications are welcome from senior legal professionals with the required experience in legislative drafting who wish to make an important contribution to a vital aspect of the Government in Northern Ireland.

An application form and more detailed information, including the duties and responsibilities of the above post, as well as the criteria to be used during the recruitment and selection process will not be available until **Monday 8 September 2008.** Please write, email or telephone HRConnect on the details below:

HRConnect, PO Box 1089, 2nd Floor, Metro Building, 6-9 Donegall Square South,
Belfast, BT1 9EW. Telephone: 0800 1 300 330
Email: recruitment@hrconnect.nigov.net

After Monday 8 September 2008 applicants are encouraged to submit an online application at the following address: **www.nicsrecruitment.gov.uk** However, requests for hard copy applications are welcomed and all applications will be treated equally regardless of whether they are hard copy or online.

All requests must include your name, address and reference number SC/7/08.

Completed application forms must be returned to arrive no later than 12:00 noon (UK time) on Tuesday 30 September 2008.

The Northern Ireland Civil Service is an Equal Opportunities Employer.

As Roman Catholics and women are currently known to be under represented in this grade, applications from Roman Catholics and women would be particularly welcome.

ALL APPLICATIONS FOR EMPLOYMENT ARE CONSIDERED STRICTLY ON THE BASIS OF MERIT.

www.nicsrecruitment.gov.uk

Commonwealth Association of Legislative Counsel

MEMBERSHIP APPLICATION FORM FOR NEW MEMBERS

The Secretary, Commonwealth Association of Legislative Counsel,
Room 832, Department of Justice, 8/f High Block, Queensway Government Offices, 66 Queensway, Hong Kong§

I, ……,wish to apply to become an individual member/associate individual member* of the Commonwealth Association of Legislative Counsel.

(signed) …….. Applicant

***Note:** Persons are eligible to become individual members of CALC if they are or have been engaged in legislative drafting or in training persons to engage in legislative drafting and are Commonwealth persons. A "Commonwealth person" is a person who is a citizen or a permanent resident of, or who is domiciled in, a country or territory that is a member of the Commonwealth of Nations. Persons who have been so engaged but who are not Commonwealth persons are eligible to become associate members of CALC.*

Please specify—

(a) your office address ……
…….. Post code ……

(b) your home address ……
…… Post code ……

(c) your office telephone no.§ …….. your home telephone no.§ ……..

(d) your office facs. no. ……..

(e) your e-mail address ……...

I *have no objection to having/do not wish to have** my home address and telephone number being included in the publication list of members. [**Delete the words that you do not want to apply to you.*]

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§ Please include your country and area codes.

Instead of sending the completed form by post, you can it by facs message or e-mail if you wish. The facs no. is +852 28691302 and the e-mail address is dr_duncan_berry@yahoo.co.uk or duncanberry@doj.go

STATUTE LAW SOCIETY CONFERENCE 2008

Presuming to Interpret—Basic Principles of Law in Statutory Interpretation

10 – 12 October 2008

Holiday Inn, Belfast, UK

Conference Programme:

Friday 10 October 2008 18.30 – 20.00 Reception
Saturday 11 October 2008 08.30 – 17.00 followed by Reception and Dinner
Sunday 12 October 2008 09.30 – 13.00 followed by lunch and optional sightseeing tour

- Two day conference ticket includes Friday evening Reception, Saturday lunch, Saturday evening dinner, Sunday lunch and all seminar papers.
- Saturday only conference ticket includes lunch and all conference papers.
- Sunday only conference ticket includes lunch and all conference papers.
- All those attending for one day only may also book for the Friday evening Reception and Saturday Dinner.

Contact:

Mary Block, Statute Law Society
21 Goodwyns Vale, London N10 2HA, UK
Email: statutelaw@aol.com
Tel: +44 20 8883 1700

Registration fees:

Form and fees received by:	***Up to and including 30 August 2008***	***After 30 August 2008***
Two-day conference ticket (includes Saturday dinner)	£160	£185
Academic	£85	£100
Student	£40	£50
One-day ticket (Saturday)	£110	£130
Academic	£50	£65
Student	£30	£40
One-day ticket (Sunday)	£60	£75
Academic	£40	£50
Student	£20	£25