Commonwealth Association of Legislative Counsel

THE LOOPHOLE

August 2010

THE LOOPHOLE—Journal of the Commonwealth Association of Legislative Counsel

Issue No. 2 of 2010

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Editor's notes

Current legislative topics

It is rare to find three articles of direct interest to legislative counsel in the public press within a period of 6 weeks. On 23 May, Vincent Browne, a well known Irish broadcaster and journalist and a non-practicing barrister, wrote in the Opinion and Analysis page of the Irish Times an item under the headline "Time to reclaim law from the legal priesthood". In the edition of the same newspaper published on 12 July, Tom O'Malley, a law lecturer at the National University of Ireland, Galway, published an article in the Law Matters section entitled "Consolidation can pull criminal system from legislative quagmire". Finally, on 14 July, there appeared in the London Times a report of a speech given by the Lord Chief Justice of England and Wales, Lord Judge strongly criticising the use of "Henry VIII" clauses by British Government Ministers.

Mr Browne's article contrasts sharply with the latter two. His is vituperative, whereas the other two are moderate in tone. Presumably, the reference to "the legal priesthood" is intended to encompass Parliamentary Counsel? If so, Mr Browne's diatribe is at best a poor attempt to deride their efforts. Mr Browne's main thrust appears to be that Irish legislation is difficult to access. If so, his choice of section 3 of the *Petroleum (Exploration and Extraction) Safety Act 201*0 (Ire) to exemplify his point is a poor one. The section makes textual amendments to an earlier Act and, in consequence, can only be understood if read in the context of that Act. At the Bill stage, an amendment to an Act will usually be accompanied by an explanatory note, but, as is the case in most other jurisdictions, it is the practice in Ireland to omit these notes when the Bill becomes an Act. Had the 2010 Act been accompanied by its explanatory note, Mr Browne could have had little complaint. The reason usually advanced for not publishing explanatory notes after enactment is that the provision explained may have been amended during its passage through the legislature. Bu surely that is easily resolved by updating the explanatory note? In my view, all Acts should be accompanied by their explanatory notes, appropriately updated to reflect any changes made during their passage through the legislature.

Apart from choosing a poor example, I believe Mr Browne is disingenuous. In reproducing section 3 of the 2010 Act, he has changed the layout and presented the words that comprise the first part of the section in a manner that makes comprehension even more difficult than is the case with the official text. Apart from that, the section mostly comprises definitions. It is thus a poor example from that standpoint alone. Definitions of terms are meaningless if not read in the context of the substantive provisions in which the terms are used. On reading the principal Act as amended, I found it relatively easy to understand. Had he chosen a better example, Mr Browne might well have made his point. Why? Because it is incontrovertible that, due to the lack of consolidation and the availability of up-to-date reprinted statutes and statutory instruments, ascertaining what the current statute law on a particular matter is a veritable nightmare in Ireland.

However, Mr Browne will perhaps be pleased to learn that Irish Parliamentary Counsel are seemingly addressing communication issues by producing shorter sentences, eliminating legalese

and generally making their legislative documents more user-friendly. His own suggestion, that when a provision is being amended "the wording of the previous section is published followed [sic] the wording of the proposed amendment", is a half-way house. The answer surely is, as many Parliamentary Counsel already do, to replace whole Parts, sections or subsections, rather than just a few words.

Mr Browne also ignores progress made during the past decade such as the repeal of old statutes through three Statute Law Revision Acts (in 2005, 2007 and 2010). The *Statute Law Restatement Act 2002* (Ire) provides a framework for the reproduction of up-to-date texts, but unfortunately, we still await its fruits.

Despite Mr Browne's misdirected attack, there is much that needs reform in Ireland. Too often, legislative reform is consigned to press releases and meetings with little action (but much activity) resulting. As an independent republic, it is a matter of ridicule that Ireland continues to depend on a number of imperial statutes, such as the *Statute of Frauds 1695* and the *Petty Sessions (Ireland) Act 1851*. That old Acts are repeatedly amended rather than consolidated and replaced suggests a serious absence of commitment to modernising the Statute Book at an official level. The *Directory of Legislation* is seriously out of date and makes the difficult task of drafting legislation far more fraught than it need be. I could go on. Those who draft legislation are painfully aware of its defects but the primary task of drafters, whether based in a Department or in the Office of Parliamentary Counsel, is to provide legislation for the Government. But since there are no votes in reforming the Statute Book, little energy will be exerted or resources expended on reform. Would not Mr Browne's invective have been better directed towards establishing a programme of consolidation and continuous restatement?

Tom O'Malley writing in the same newspaper identifies piecemeal amendment as a serious problem in ensuring that the citizen has access to the criminal law. The traditional dictum that ignorance of the law is no defence seems a bit thin when the State itself is responsible for the law being in a condition that renders it unnecessarily difficult for the citizen to access. This basic failure of communication dwarfs what criticism may be made of the language of the law. An active policy of restatement would address the concerns of those who consider that consolidated texts have a "short shelf life" to quote O'Malley. Modern technology makes consolidation all the easier. The major obstacle is will and a willingness to dedicate appropriate resources. That the criminal law has become overly complex and that there is a real danger of courts acting on the basis of the wrong law is illustrated by two recent cases I commented on in the last *CALC Newsletter*,[1] one English and the other Irish. In the English case, *R. v. Chambers*[2], an application was made to the court to confiscate the proceeds of crime grounded on a repealed enactment. And in the Irish case, *Quinlivan v. O Dea*, the applicant sought an injunction on the basis of a

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1 See CALC Newsletter, March 2010, pp 19-21.

2 All England Official Transcripts (1997-2008).

repealed provision. Surely the public (and I include judges and lawyers in that term) are entitled to something better than this?

Lord Judge is as blunt as Mr Browne, but his tone is much more moderate and balanced. Speaking at the annual dinner for members of the UK Judiciary earlier this month, he expressed alarm at the proliferation of legislative provisions enabling UK Ministers to create laws themselves. This, he said (and not without justification in my view), threatened the sovereignty of the UK Parliament.

Lord Judge was also troubled by the extent of powers granted to officials of local authorities to enter people's homes without a warrant. He also expressed concern about the way in which apparently sensible powers to combat terrorism were used (abused?) to control activities that have nothing to do with terrorism. I must confess that at the time these laws were enacted post '9/11' (why not '11/9'?) I feared that law enforcement officers would abuse their anti-terrorism powers. It seems my fears were not ill-founded. However, Lord Judge's deepest concern related to the proliferation of 'Henry VIII clauses', which as all legislative counsel know confer power on Ministers to amend or repeal primary legislation by secondary legislation, such as a Ministerial order. According to Lord Judge, more than 120 such clauses had been created in just one parliamentary session! He went on to point out that the proliferation of these clauses would have the inevitable consequence of damaging the sovereignty of Parliament as well as increasing yet further the authority of the Executive over the Legislature.

One example he cited was the *Banking (Special Provisions) Act 2008*, which was enacted at the height of the banking crisis. This Act gave the UK Treasury power to repeal any relevant statute or rule of law. He expressed alarm at the possibility of the Treasury being able to repeal any rule of law, or that a Minister could change constitutional arrangements, without the involvement of Parliament. (He did, however, emphasise that he was not suggesting that any of the Ministers who were in office before the last UK election or who are now in office were or are intent on subverting the British constitution.) But, as he pointed out, "history is long as well as short and what is to come is always unsure". He concluded by urging that "Henry VIII clauses should be confined to the basement of history". I would say Amen to that, but as a legislative counsel who has been in the game for a very long time, I do have to concede that it is useful to be able to make minor machinery amendments to primary legislation by secondary legislation. But there is the rub. Where is the line to be drawn between what is a 'machinery' amendment and what is not?

In contrast to the United Kingdom, the Irish Supreme Court has, with one exception, indeed consigned Henry VIII clauses to the basement of history. See Mulcreevy v. Minister for Environment, Heritage and Local Government & Ors [2004] IESC 5 (27 January 2004). The one exception is where such a clause is necessary to give effect to a Directive, Decision or Regulation emanating from the European Union. Although this decision did at the time cause some inconvenience (not to say consternation) within the Irish Office of Parliamentary Counsel, that Office does seem to have come to terms with it since. I think on balance the Irish Supreme Court was right. But I doubt that it would have arrived at its decision in Mulcreevy if it were not for the fact that it operates under a written constitution, whereas the UK Supreme Court does not. I

doubt that the latter Court would be able to arrive at a similar decision under the current constitutional arrangements existing in the United Kingdom.

CALC 2011—Hyderabad—9-11 February 2011

Planning the conference agenda is well-advanced. The theme of the conference --*Legislative Drafting A Developing Discipline* -- and its seven sub-themes will be amply covered by a broad range of speakers drawn from the CALC membership as well from the host jurisdiction of India and others such as the US and the Netherlands. An additional sub-theme has been included -- *Legislative Drafting, Contemporary Issues and Challenges* -- to encompass proposals that address drafting technique relating to things like reader aids (notably headings and titles), enforcement of legislation and supra-national frameworks. Details of the programme are as follows:

Conference programme—Wednesday 9 February[3]

Registration: 1:30 to 2:00 pm

Opening: 2:00 to 2:15 pm

Eamonn Moran, President of CALC

Session 1: 2:15 to 2:45 pm

Keynote Address: To be announced.

Session 2: 2:45 pm to 3:45 pm

Legislative Drafting: Art, Science or Discipline?

This general sub-theme could be used to kick off the conference. It would be addressed at a fairly high level of generality to make it appealing across a wide variety of jurisdictions with different institutional arrangements for the preparation of legislation.

Speakers: Sandra Markman, Roger Rose

[3] This programme is provisional and subject to change.

Tea/coffee break: 3:45 to 4:00 pm

Session 3: 4:00 pm to 5:30 pm

Role and Efficacy of Legislation

Legislation is drafted and enacted for many reasons. Lord Thring famously said that "bills are made to pass as razors are made to sell". What did he mean? Is this still true today? Ideally, legislation should accomplish public goals established through democratic processes. Does it always do this? How do political processes alter the role of legislation? Is any attention ever paid to whether it accomplishes its supposed purposes?

Speakers: Doug Bellis, Paul Peralta, Ross Carter, Sudha Rani

Conference programme—Thursday 10 February

Morning tea/coffee: 8:30 to 9:00 am

Session 4: 9:00 to 10:30 am

The Wavering Line between Policy Development and Legislative Drafting

The centralized legislative drafting model used most widely in Commonwealth countries is premised on a distinction between policy development and legislative drafting. What are the benefits of this model and the challenges of maintaining it? What are good drafting instructions and how can policy officials be instructed on preparing them?

Speakers: Paul Salembier, Therese Perera, Elizabeth Grant, Daniel Lovric

Tea/coffee break: 10:30 to 11:00 am

Session 5: 11:00 to 12:30 pm

Legislative Counsel in Developing Countries

This sub-theme covers the dynamic role of legislative counsel in developing countries (the need for legislative counsel to multi-task): due to staffing problems or limitations, legislative counsel are normally involved in parliamentary committee work, policy review and legal reform.

It also considers the role of legislative counsel in the policy development process: the realisation of their contribution, conducting comprehensive needs assessments for offices of legislative counsel and promoting the inclusion of these needs in parliamentary and rule of law country development programmes.

Speakers: Malietau Malietoa, Sir Victor Glover

Lunch: 12:30 to 2:00 pm

Session 6: 2:00 to 3:30 pm

Training and Development of Legislative Counsel / Drafters

> This practical session covers in-house, distance-learning and conventional training programs for the variety of skills required, including the use of information and communication technology. It also looks at mentoring and twinning programmes and extends to the retention of legislative counsel/drafters.

Speakers: Mark Audcent, Estelle Appiah, Archie Zariski, Lionel Levert

Tea/coffee break: 3:30 to 4:00 pm

CALC General Meeting: 4:00 to 5:30 pm

Conference programme—Friday 11 February

Morning tea/coffee: 8:30 to 9:00 am

Session 7: 9:00 to 10:00 am

Legislating Across Languages: The Challenges of Law-making in Multi-lingual Jurisdictions

> This sub-theme looks at drafting legislation that is intended to apply in linguistically diverse communities. What are the challenges of preparing multiple versions and ensuring that they say the same thing? How do courts and other interpreters deal with discrepancies if they arise?

Speakers: Marie-Claude Guay, Angie Li, Allen Lai

Session 8: 10:00 to 11:00 pm

Emerging trends in improving legislative drafting: Harnessing Information and Communication Technology

> This sub-theme focuses on development of software and the use of available information technology applications that facilitate information-sharing and cooperative work activities.

Speakers: Wim Voermans, Ed Hicks

Tea/coffee break: 11:00 to 11:30 am

Session 9: 11:30 to 1:00 pm

Legislative Drafting: Contemporary Issues, Trends and Challenges

This session will cover titles, headings and other aids to understanding a legislative text.

Speakers: Peter Quiggin, Nick Horn, Paul O'Brien,

Lunch: 1:00 to 2:30 pm

Session 10: 2:30 to 4:00 pm

Legislative Drafting: Contemporary Issues, Trends and Challenges (continued)

This session will cover—

- the implementation of supra-national law in domestic legislation,
- provisions for ensuring compliance with legislation,
- democratic protections for the lesser developed nations in the drafting international commercial law.

Speakers: John Moloney, Duncan Berry, Mateo Goldman

***Tea/coffee break:* 4:00 to 4:30 pm**

***Open Forum and Closing:* 4:30 to 5:00 pm**

The 17th Commonwealth Law Conference—Hyderabad, India—5-9 February 2011

Join the CLA for the 17th Commonwealth Law Conference 'Emerging Economies & the Rule of Law - Opportunities and Challenges' Hyderabad, India, 5-9 February, 2011

The Commonwealth Law Conference (CLC) is a prestigious event that brings together legal practitioners from all over the Commonwealth to debate current issues affecting practice and the profession, exchange views and experiences with colleagues and get up to date with the latest commercial products and services.

Keynote speakers include:

- Hon. Chief Justice Iftikhar Muhammad Chaudhary, Pakistan
- Justice B. Sudershan Reddy (India) - Judge Supreme Court of India
- Lord Lester of Herne Hill, QC (UK) - Specialist in Public Law & Human Rights
- Richard Susskind (UK) - Specialist in IT & the Law

Registration is now available, so book today and don't miss out!

Programme

- <http://paslava.com/fb/82A72060B68C035727157432613A36C33595977D015652120EA7139758E9B8C903838244967EDAD943543DF0EAAF4FFC/show.aspx>

Registration

- <http://paslava.com/fb/82A72060B68C035727157432613A36C32ABFB8EED06B12B8A8B694CBD61437158BD57D291E857B99C675A4F710D6A9B2/show.aspx>
- For further information visit: www.commonwealthlaw2011.org <http://paslava.com/fb/C301AF7244783FA2624FCD241BA81170DB4EC33B0F6B94DCE06F2FF9F540C719CE43F56A2CD246F7B24C7E4F21CDE849/show.aspx>

CIAJ Legislative Drafting Conference: Re-imaging the Law: Legislative Drafting Redefined - 13 and 14 September 2010, Ottawa, Canada

This conference will focus on how the evolving legal concepts of a diverse community are redefining legislative drafting. Those entrusted with preparing draft legislation bring specialized knowledge and understanding to their creation. In response to a growing environment, they are further called on to integrate the new and broader concepts of an evolving global community. Within that context, particular topics will examine the value and contributions of the legislative counsel to the intricate fabric of legislation; the professional and ethical dimensions of the legislative counsel within a modern, complex work environment; the evolving legal, cultural and language issues that must be considered and integrated into legislation and how they are redefining the way we draft. The conference will also include workshops dealing with practical drafting issues as they relate to English, French and Aboriginal languages. Conference participants can expect to come away with a better understanding of how legislation is being redefined in broad terms to adapt to an ever changing environment and how the drafting profession is responding tore-imaging of the law.

Conference programme—Monday, 13 September

8:30 Registration

9:00 Welcome and conference opening

Conference Co-Chairs

Philippe Hallée, Deputy Chief Legislative Counsel, Department of Justice Canada, Ottawa

Laura Hopkins, Legislative Counsel, Office of Legislative Counsel (Ontario), Toronto

9:15 Keynote Address

Enhancing the Legislative Process: The Value of the Legislative Drafter

Introduction: Laura Hopkins, Legislative Counsel, Office of Legislative Counsel (Ontario), Toronto

Speaker: Donald Revell, Former Chief Legislative Counsel of Ontario, Toronto

10:00 Ethical and professional responsibilities in a shifting environment: Roles and Relationships

> The professional responsibilities of legislative counsel are among the most complex of any legal professionals. What are the professional and ethical responsibilities of legislative counsel in a changing environment? How have they evolved? How are the broader notions of corporate social responsibility and public interest expressed in those responsibilities?

Moderator: Mark Audcent, Law Clerk and Parliamentary Counsel, Senate of Canada, Ottawa

Panelists: John Mark Keyes, Chief Legislative Counsel of Canada, Department of Justice Canada, Ottawa; W. Bradley Wendel, Professor of Law, Cornell Law School, Ithaca, NY, USA; Robyn Hodge, Assistant Parliamentary Counsel, New South Wales Parliamentary Counsel Office, Sydney, NSW, Australia

11:00 Break

11:30 Workshop

Uncovering the Dynamic: Expectations and Challenges

> What are some of the practical issues arising out of drafters' professional relationship with government? Actual experiences, particularly in light of the evolution of those responsibilities? What are the challenges? How can we address them or adapt to them? The panelists along with other experienced drafters will guide group discussions. Participants will then reconvene to share their findings and opinions with the panel in an open discussion

12:30 Lunch - Luncheon Speaker

Re-imaging the law through language and culture: aboriginal law-making

> This panel will examine the evolution of Aboriginal legal concepts and language and their integration into Canadian and New Zealand legislation. The panel will also focus on how Aboriginal languages are re-imaging the laws in these jurisdictions.

Introduction Mark Aitken, Director, Northwest Territories Legislation Division, Yellowknife; Naiomi S. Metallic, Associate, Burchells LLP, Halifax

Panelists Jacinta Ruru, Senior Lecturer, Faculty of Law, University of Otago, Dunedin, New Zealand; Lorena Fontaine, Assistant Professor, Aboriginal Governance Program, University of Winnipeg, Winnipeg; Susan Hardy, Acting Director, Nunavut Legislation Division, Iqaluit; André Samson, Consultant, Legal Translation and International Development, (formerly Manager, Legal Translation in Nunavut Legislation Division), Ottawa

15:45 Break

16:15 Workshop

> This practical workshop focuses on the use of Aboriginal language in legislative texts but also on the valuable contribution of a particular language to the judicial interpretation of aboriginal concepts.

Maxime Lamothe, Legislative Counsel, Department of Justice Canada, Ottawa

Sarret Smith, Legislative Counsel, Department of Justice Canada, Ottawa

17:30 Reception at the Supreme Court of Canada

Conference programme—Tuesday, 14 September

Re-Imaging the Law through the Harmonization of Legal Regimes and Concepts

> Is our own legislative culture changing in favour of global norms? How are we being influenced by the harmonization movement? What might the future hold? This panel will examine the Uniform Law Conference of Canada commercial law experience as it relates to the integration of non Canadian norms into Canadian legislation, the harmonization of those norms within Québec civil law, as well as the American experience in that regard.

Introduction: Judith Keating, Q.C., Chief Legislative Counsel of New Brunswick, Fredericton

Pierre Charbonneau, Senior Legislative Counsel, Department of Justice of Quebec, Quebec City

Panelists Kathryn Sabo, General Counsel, International Private Law Section, Department of Justice Canada, Ottawa; Frédérique Sabourin, Attorney, Department of Justice of Quebec, Quebec City; Edwin E. Smith, Chair, Committees on the Implementation of the UN Receivables

Convention and of the UN Convention on Independent Guarantees and Stand-by Letters of Credit, Bingham McCutchen LLP, Boston, MA, and New York NY, USA

10:30 Break

11:00 Evolving Legislative Design: The Case of Management Based Regulations

> The session will examine how the introduction of management based regulations is changing traditional drafting methods. It will look at how regulated corporate entities engage in their own planning and internal rule making so as to achieve specific public goals. Recent examples of these regulations relate to food safety, environmental protection, mine safety and occupational health and safety.

Introduction: Philippe Hallée, Deputy Chief Legislative Counsel, Department of Justice Canada, Ottawa

Speaker: Cary Coglianese, Deputy Dean and Edward B. Shils Professor of Law and Professor of Political Science; Director, Penn Program on Regulation , University of Pennsylvania Law School, Philadelphia, PA, USA.[1]

12:00 Lunch

13:30 Workshop

> The workshop session allows participants to focus on the practical challenges encountered in drafting. It also allows for an opportunity to put some of the concepts learned during the conference into practice.

Group Leaders for English Groups: Laura Hopkins, Legislative Counsel, Office of Legislative Counsel (Ontario), Toronto; Brenda MacKenzie, Senior Legislative Drafter, Department of Justice Canada, Ottawa

Group Leaders for French Groups: Jean-Paul Chapdelaine, Senior Drafter, Department of Justice Canada, Ottawa,

Jacques Lagacé, jurilinguist, Department of Justice of Quebec, Quebec City

15:00 Break

15:30 The Durability of Laws

> As the legislative text evolves, we make enduring changes to the law. This closing presentation will leave you with some interesting statistics on the permanency of the written word.

Introduction Philippe Hallée, Deputy Chief Legislative Counsel, Department of Justice Canada, Ottawa

Speaker: Janet Erasmus, Chief Legislative Counsel of British Columbia, Victoria

16:30 Conference Adjournment

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The consultative process in social policy legislation: the experience of Ghana in the Property Rights of Spouses Bill[1]

Estelle Appiah[2]

Introduction

The genesis of the Ghana Property Rights of Spouses Bill 2009 is the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). The Convention was adopted on the 18 December 1979 and entered into force as an international treaty on 3 September 1981.

It was the culmination of more than 30 years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and promote women's rights. The spirit of the Convention is rooted in the goals of the United Nations, fundamental human rights and equal rights for men and women.

Article 2 of the Convention stipulates as follows:

> "State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end undertake—
>
> - to embody the principle of equality of men and women in their national constitutions or other appropriate legislation, if not yet incorporated therein and

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1 This is an edited version of a paper given at the CALC Africa Region Conference held in Nigeria in April 2010.

2 Director of Legislative Drafting, Attorney-General's Department, Ministry of Justice, Ghana

to ensure through law and other appropriate means, the practical realisation of this principle,

- to adopt appropriate legislative measures, including sanctions where appropriate, prohibiting all discrimination against women, and
- to establish legal protection of the rights of women on equal basis with men and to ensure through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination."

Article 16 of the Convention provides that:

> "States Parties shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ...'.

The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration"

The CEDAW was domesticated in the 1992 4th Republican Constitution of Ghana. Article 22 in the Chapter on Fundamental Human Rights requires Parliament to enact laws to ensure that the property rights of spouses are guaranteed on dissolution of marriage and that jointly acquired property is distributed equitably. Article 22 (2) provides that—

> "(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses"

Another source of international law that supports article 22 is the African Charter on Human and Peoples Rights.

The Constitution came into force on the 7 January 1993 and several attempts were made after that to prepare legislation on the property rights of spouses to deal with the rights of spouses to jointly acquired property on separation and divorce.

The first major legal pluralism legislation was the *Intestate Succession Act* (PNDCL 111) enacted in 1985. This legislation has recently been reviewed to deal with anomalies that have become apparent after more than 20 years because of changes in the Ghanaian family system and the shift in focus to the nuclear family from the traditional extended family system.

The major challenge with legislation on intestacy and property rights in a subsisting marriage system stems from the plural legal system in the country. Law as a tool for social change is complicated by the pluralistic legal system in Ghana.

Article 11 of the Constitution includes common law in the laws of Ghana. The article defines common law as comprising the rules of law generally known as the common law, the doctrines of equity and the rules of customary law. For purposes of the article, customary law means the rules of law which by custom are applicable to certain communities in Ghana. The import of this is that various customary laws determined by ethnicity or locality apply to the populace.

The dilemma for legislative counsel

The dilemma is how the legislative counsel can craft a unified law to regulate property rights of spouses which will apply regardless of different customary law.

The *Marriages Act, 1884 – 1985* CAP 127 recognises customary marriages which may be registered under the Act as well as Muslim Marriages. The Act also applies to Christian and other marriages.

National legislation that currently deals with matrimonial property can be found in the *Matrimonial Causes Act, 1971* (Act 367). Section 41 of the *Matrimonial Causes Act, 1971* (Act 367) makes it possible for those married under other systems to apply its provisions as regards the dissolution of marriage and the law has some provision on financial settlement after divorce. The rules on the distribution of property on divorce are not sufficiently far reaching to satisfy the Constitutional requirement.

Different sets of rules using different principles and concepts have been used to determine the property rights of spouses. The lack of clear standard provisions fashioned on the philosophy of the Constitutional provisions has led to disparaging court decisions.

Under customary law, there is a concept of separateness of identity and of property acquisition. The issue of defining what joint property is in this context becomes an issue where a spouse, generally the vulnerable wife, makes a form of contribution to the acquisition or improvement of the property of the other spouse. In this context what is the beneficial interest to be given to the spouse who contributed? What is the situation where multiple wives contribute to the property of a husband such as in a Muslim or customary marriage both of which may be polygamous? What is the situation where there is cohabitation and no marriage but where the spouses are capable of being married to each other? What about gifts and money given by a husband to a wife to trade, referred to as "seed money", is this a gift? What is joint property?

The courts in Ghana have attempted to deal with these complex issues but the decisions vary and lack consistency. The drafting of the Property Rights of Spouses Bill presented a difficult task and was only able to be brought to fruition because of the consultative process it went through. The Bill is an example of social change by legislation. The Bill reflects law by the emergence of social and economic factors.

The importance of achieving a national consensus

It was important to achieve a national consensus on the desirability of the law in order to prevent a situation in which the law is likely to be ignored in many parts of the country.

The techniques for a research report recommended by Ann and Robert Seidman and Abeyesekere in their book "Legislative Drafting for Democratic Social Change" propose a template for effective legislation for social change that can be applied to the consultative process in social policy legislation.

The first step is to identify the difficulty in the subject matter some of which have been

mentioned. The second stage is an analysis of the causes of the difficulty. The legislative counsel must systematically propose and test alternative explanatory hypotheses concerning the causes of the difficulty, in this case the peculiar cultural factors. The next stage is the proposal of a solution and the final stage is the monitoring and evaluation of the system.

These four steps formed the roadmap for the Property Rights of Spouses Bill.

How Ghana succeeded in meeting its constitutional requirement

On the basis of proposals submitted by an NGO in October 2000, the Legislative Drafting Division of the Attorney-General's Office prepared a draft Bill on the Property Rights of Spouses which was completed during the latter part of 2002. The Bill was sponsored by the Attorney-General and Minister for Justice because its source was the Constitution. However, the proposals were sketchy and so the Ministry of Justice sent letters to the Law Reform Commission, the Ministry of Women and Children's Affairs, Civil Society groups like the Federation of Women Lawyers FIDA (Ghana) and Alumnae Incorporated another women's NGO group for proposals on the subject matter. A law professor also prepared and presented a paper to the Ministry of Justice. Following a formal request by the Ministry of Justice in 2005, the Law Reform Commission submitted a final report on Law and Poverty Reduction. This report incorporated some proposals in respect of the property rights of spouses.

However, there was a need for further proposals to enable the Attorney-General's Department of the Ministry complete work on the draft Bill. Requests in this regard were sent to the Minister for Women and Children's Affairs in January 2006. An additional report was received from the Law Reform Commission in December 2006.

In order to obtain fresh insight from other sources conversant with family law, the Attorney-General's Department requested proposals from legal practitioners and the National House of Chiefs, the apex institution of traditional rulers.

The first consultative workshop was organised by the Ministry of Women and Children's Affairs on the 18 April 2007. At this forum the Director of Legislative Drafting gave a presentation on the draft Bill.

As a result of a bilateral agreement between the Government of Ghana and the Government of Germany, the German Development Co-operation (GTZ) provided assistance to the Ministry of Justice and Attorney-General's Office. This was for the consultative process of the Bill as part of co-operation between the Good Governance Programme and the Office of the Attorney-General and Minister for Justice in the framework of technical co-operation on legal reforms, in particular those concerned with legal pluralism.

The Law Reform Commission was requested to provide information to help with the preparation of a questionnaire to be distributed to a cross section of people from the public and private sector with the help of the GTZ which engaged the service of two legal assistants as researchers.

A meeting was held in September 2007 to discuss the questionnaire. In attendance were legal

academic representatives from civil society and the Commission on Human Rights and Administrative Justice and public officers including the Director of Social Welfare.

In August 2007, the Judicial Secretary was requested to compile a list of judicial officers in a position to assist with answering the questionnaire to enhance the draft Bill. The questionnaire was distributed but the number of responses was disappointing.

To further enhance the draft Bill, the Ministry of Justice and the Ministry of Women and Children's Affairs with the support from the GTZ proposed a two-day expert hearing on the draft Bill in September 2007. The aim of the meeting was to learn from the Benin experience in the drafting and passage of their Benin Family Code and to enrich the Draft Bill on the Property Rights of Spouses. The expert was Professor Abraham Zinzindohoue, a former Minister of Justice, Chief Justice and Member of Parliament of Benin.[3]

There were four sessions with focus groups made up of an average of 25 participants. The first group consisted of the Ministry of Women and Children's Affairs, gender advocates, civil society and faith based groups. The second group was for representatives of traditional authorities. The other two groups comprised Parliamentarians and the Judiciary and legal practitioners.

There was a facilitator who gave a general overview of the programme. The Director of Legislative Drafting gave the background of the draft Bill. The inadequacies in the existing law were mentioned and the need to create uniformity in the various types of marriages and to recognise the contributions of non-working spouses and the vulnerable spouse who may sacrifice education, employment opportunities for the family was emphasised.

The comparison with a legal system rooted in the *Napoleon Civil Law of 1958* and the dualism with customary law was compared to the situation in Ghana. The recommendations from the workshop on the conditions for cohabitation, the matrimonial home, premarital agreements, contribution and distribution were noted. Alternative dispute resolution before court process was also recommended.

The next stage in the consultative process occurred when the Director of Legislative Drafting was invited by a women's NGO in October 2007 to give a presentation on the draft Property Rights of Spouses Bill.

This was followed by a National Consultation on the draft Bill in November 2007 organised by the Ministry of Women and Children's Affairs. Presentations at this forum were made by representatives of the Legislative Drafting Division in local languages.

To further enhance the draft Bill and involve other stakeholders in the consultative process, it was decided that it would be necessary to embark on a nation-wide dissemination exercise a "Road Show" to create awareness about the Bill and make it more practicable and accessible to the

[3] Benin is a francophone country in the West Africa Sub-region.

citizenry.

To assist with the process, organisations such as the National Commission on Civic Education and the Information Services Department and other stakeholders such as NGOs were invited in November 2007 to discuss the modalities for the Road Show scheduled to take-off in January 2008. This however stalled due to lack of funds.

A meeting was held in December 2007 with NGO groups "on the way forward". The GTZ Good Governance Programme Director mentioned that the technical assistance that her organisation had provided was to facilitate the process of participatory law making so that those affected would have ownership. Knotty issues were reviewed and settled. It was agreed that a vital tool for the advocacy programme would be the preparation of guidance notes to the Bill so that those concerned would speak with one voice. The guidance notes were also to be used for the training of trainers and were subsequently prepared by the Legislative Drafting Division.

There was a consensus that the best way forward was to form a coalition of NGOs for a public sensitisation programme before and after the enactment of the Bill. The coalition was to advocate for the passage of the Bill and push for implementation of the law.

A legal experts meeting was held in January 2008 to consider the draft Bill which was now looking promising. In attendance were representatives from the Ghana School of Law and the law faculties from two universities. The others came from the Ghana Bar Association and the Judicial Service and there were other legal experts on land, family law and Islam. This meeting was particularly useful and greatly enriched the proposals.

Apart from these processes, the Muslim Family Counselling Services was engaged as a consultant by GTZ to provide comments on the Bill and ensure that Islamic law was adequately considered. They organised consultative fora in different parts of the country for the purpose in January and February 2008.

Legislation from other Commonwealth jurisdictions like Jamaica, Tanzania and South Africa were reviewed. This was considered appropriate as Commonwealth jurisdictions have much in common and the selected countries have plural legal systems.

In May 2008, GTZ sponsored a 10 day study tour to South Africa on the Property Rights of Spouses Bill. The tour was to obtain expert advice from a country with long standing experience with matrimonial property legislation in a situation of legal pluralism including Islamic law. The tour was also to enable the participants from the Legislative Drafting Department, the Judiciary, Parliament and the Law Reform Commission gain insight into the experience of South Africa in respect of the Bill. Topics for discussion for the tour were prepared by the Legislative Drafting Division prior to departure.

The Bill was laid before Parliament in the last meeting of the session in 2008. Unfortunately it was not passed before the general elections in December 2008 and therefore lapsed although discussions at the committee stage had started. The Bill was laid in Parliament on the 3rd November 2009 and was referred to a joint Committee; the Constitutional, Legal and

Parliamentary Affairs Committee and the Gender and Children Committee for consideration and report. After several Committee meetings, in February 2010, it was decided that Parliament itself should embark on a nationwide consultation because this legislation is far reaching and ground breaking. The consultative process to be organised by Parliament is scheduled to take place during the long parliamentary recess before the next meeting of Parliament commencing in October this year. It is expected that the Bill will be passed before December 2010.

The Property Rights of Spouses Bill has been prepared for resubmission in the first session of the Fifth Parliament in 2009 after some final revision to fine tune the language for clarity.

Conclusion

The genesis of this important social policy Bill has been a classic case of consultation, education and consensus building. The assistance provided by GTZ greatly facilitated the research and consultative process. Vulnerable spouses and human rights activities are anxiously waiting for the enactment of this ground breaking legislation which will provide unequivocal rules for the distribution of property between spouses on separation and divorce. The successful implementation of the Bill when enacted will be a testimony to the collaborative process and hopefully will be a piece of human rights legislation that the people of Ghana can be proud of even if the law has taken 17 years to be enacted.

Abbreviations

CEDAW Convention on the Elimination of All Forms of Discrimination against Women.

FIDA International Federation of Women Lawyers

GTZ German Technical Cooperation

NGO Non-Governmental Organisation

PNDCL Provisional National Defence Council Law

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1. CEDAW 29th Session 30th June – 25th July, 2003 introduction.
2. Access to Justice Series, Attorney-General and Ministry of Justice, GTZ Legal Pluralism and Gender Pilot Project.
    - No. 6 Property Rights of Women in Ghana
    - No. 7 Marriage forms and Matrimonial Property Rights in Ghana
    - No. 8 Seed Money in Marriages in Ghana
3. Legal Drafting for Democratic Social Change
    - Manual for Drafters
    - Ann Seidman
    - Robert B. Seidman and

- Walin Abeysekere

The difficulties of teaching legislation to students[1]

John Burrows[2]

Introduction

Before becoming a Law Commissioner I spent more than 40 years teaching law at the University of Canterbury in New Zealand. I had the privilege of teaching, and learning with, many very bright young people. They mostly came to the study of law with little background knowledge of the subject and no preconceptions. They found the study of law quite hard. In particular, they found statute law hard, and they also found quite a lot of it boring. They liked the common law better, and were more at home with the judgments of the courts than they were with the work of Parliamentary Counsel. I would like in this talk to ask why that is the case, and then explain what we might do to right the balance.

Why is statute law hard?

So, then, why do students find statute law a struggle? I can dispose of two reasons fairly quickly, because they are not confined to statute law.

First, much of the subject matter of statutes is complicated. That is to be expected. Society is complex and the economy is complex, so the laws regulating them will obviously reflect that complexity. There will be categories and sub-categories; there will be rules, exceptions to the rules, and qualifications to the exceptions. But statute law does not have this to itself. Some areas of the common law are equally complex, if not more so. We can all bring to mind areas of the common law of contract which were close to nightmare territory: contractual mistake was one.

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[1] This is an edited version of a paper given at the CALC conference held in Hong Kong in April 2009.

[2] Member, New Zealand Law Commission; Former Professor of law at the University of Canterbury, New Zealand. I thank Zoe Prebble for her assistance with research for this paper.

Secondly, statute law can be hard to find. If you set students a research exercise they will often struggle to find all the relevant provisions. Our statute law has grown up in ad hoc fashion, one piece after another. Unlike the codes of some other countries, our statute law has no logical order or system. I am reminded of the words of Jeremy Bentham[3]:

> "As if from a rubbish cart a continually increasing and ever shapeless mass of law is from time to time shot down upon the heads of the people, and out of this rubbish and at his peril is each man left to pick out what belongs to him."

Individual pieces can get lost in the mass. I once set my students an essay involving door-to-door selling and the controls upon it. They all had no trouble finding the leading piece of legislation, the *Door to Door Sales Act 1967*. But the great majority missed an important provision about door-to-door selling, which is contained in the *Securities Act 1975*. Sometimes more than two provisions bear on a subject in ways which, at first sight anyway, are not consistent. Sometimes provisions are hidden in places where you would least expect to find them. Who would ever think that a fundamental contractual rule about part payment of a debt would be secreted in the *Judicature Act 1908*? There is much more we could do to make our laws more findable. In my country, a comprehensive index would be a good start, together with a programme of consolidation or revision. The New Zealand Law Commission has recently so recommended.

But once again this problem of finding or accessibility is not peculiar to statute law. Common law cases can also be overlooked. It is all too easy to miss the fact that the case one has cited was recently reversed by the Supreme Court. We occasionally forget how much we rely on the writers of textbooks to help us find what is relevant.

So neither of these initial problems faced by the law student is confined to statute law. The problems assume different guises in common law and statute law, but essentially they are the same problems.

I want now to look at the things that make statute law hard and the things about it in particular that deter students. In what follows, I am assuming that my student is a bright young person, coming to the law for the first time, with very little prior knowledge. He or she is in fact an intelligent lay person. Here are the things that he or she finds difficult.

The first, of course, is the way that statute law is drafted. I hasten to say that I am referring here mainly to older statutes. Everyone knows that the traditional style of legislative drafting was not exactly user-friendly. While modern statutes are light-years better, there are still plenty of the old ones in force. New Zealand still has Acts more than 100 years old. Some decades seem worse than others. New Zealand endured a particularly rough patch in the 1950s. The *Trustee Act 1956* (which is one of New Zealand's most important and basic statutes) is an example. Here is section 64(1):

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[3] Jeremy Bentham, an Englishman, to the Citizens of the Several American United States, Letter 8

64 Power of Court to authorise dealings with trust property

Subject to any contrary intention expressed in the instrument (if any) creating the trust, where in the opinion of the Court any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income:

Provided that, notwithstanding anything to the contrary in the instrument (if any) creating the trust, the Court, in proceedings in which all trustees and persons who are or may be interested are parties or are represented or consent to the order, may make such an order and may give such directions as it thinks fit to the trustee in respect of the exercise of any power conferred by the order.

Just look at it. It is a single sentence. The long sentence is the greatest impediment to understanding: with it tend to go awkward grammatical structure, surplus words, and repetition. These features make it almost impossible for anyone to retain the sense. The example I have just shown you is also replete with some archaic language ("provided that", "the same", "thereof"). A young student is likely to look to a textbook for a paraphrase, rather than begin on the journey of reading the section him- or herself. Let me say in parenthesis that while legal documents are the most frequent offenders in the long sentence stakes, they are not the only ones. Our literature contains them as well. A Google search informs me that Jonathan Coe's novel "The Rotters' Club" contains a single sentence of 13,955 words, although I think grammarians have concluded that it is not a real sentence, just an unbroken string of words. The Guinness Book of Records states that the longest single sentence in literature is one of 1,287 words in William Faulkner's novel "Absalom, Absalom". So it is not just your Parliamentary Counsel forebears who sinned in this regard, but in the old days they did it more persistently than anyone else.

Modern statutes are a different proposition altogether. Plain language has arrived in New Zealand and as far as I can see in most other jurisdictions as well. Most modern statutes are a breath of fresh air compared with their predecessors. Their sentences are short, or, in cases where they need to be longer, they are broken up into numbered or lettered parts. The sense is conveyed as directly as possible. No more words are used than are necessary (but no fewer either).

Some statutes, although still a minority, use aids such as examples, flowcharts and overview summaries. There is a nice use of examples in the Student Loan Scheme Amendment Act 2007 (NZ), which introduces into the statute two students named Lenore and Keith.

Here is how Lenore's problem is sorted:

Example 1: Lenore

> Lenore has a loan balance on 1 April 2005 of $15,000. Lenore was issued with non-resident assessments of $1,997 for the 2005-06 tax year and $1,919 for the 2006-07 tax year, which she has failed to pay. The 2005-06 assessment ceased to be subject to standard interest (7% for the 2005-06 tax year) and instead became subject to compounding late payment penalties of 2% per month from 1 April 2006. The 2006-07 assessment ceased to become subject to standard interest (6.9% for the 2006-07 tax year) 1 year later on 1 April 2007. Her total late payment penalties on 31 March 2007 are $536 and her loan balance is $17,555.
>
> On 1 April 2007 her overdue debt is zero and her loan balance is reduced by $398 (penalties of $536 less interest of $138 charged in place of penalties) to $17,157.

There are differing views about these modern aids, but to my mind this sort of thing is all to the good.

However even the shortest and plainest language in our most modern statutes can still daunt the beginner. Plain language does not necessarily mean interesting language. Take a recent New Zealand Act, the *Human Tissue Act 2008*. It is about respect for and protection of body parts. It sounds fascinating. But here is section 56(1):

56 Trading in human tissue generally prohibited

(1) No person may, except under an exemption under section 60, require or accept, or offer or provide, financial or other consideration for human tissue.

(2) A person commits an offence, and is liable on summary conviction to imprisonment for a term not exceeding 1 year or a fine not exceeding $50,000, if—

(a) the person intentionally or knowingly does an act; and

(b) that act contravenes subsection (1).

There is no waste verbiage there, and it is hard to see how it could have been put any more simply. I have no criticism of the drafting at all. But our student will not find it anything like as interesting or enjoyable as he or she was hoping. It is very different from the student's normal reading matter: novels, short stories, internet blogs and Facebook pages. First, the language, although short and simple, is much more formal than any of those other types of documents. It is in a different register; it is precise and rather stiff. No-one else writes or talks like that. One seldom finds colloquialisms in legal writing, although occasionally they do appear and seem inappropriate when they do.

Secondly, the provision contains some technical legal language: the word "consideration" is probably not one that the beginner will have heard before, at least used in this sense. "Summary conviction" will be unfamiliar.

And, thirdly, there is that all-pervasive feature of statutory drafting, the cross-reference. Section

60 is referred to. References to other provisions are just part and parcel of the modern statute. William Dale[4] called this phenomenon "centrifugence" because the reader is constantly being drawn away from the central focus to examine other parts of the document. In this provision there is a hidden cross-reference as well. So what is "human tissue"? A practised reader will detect straight away that this term is probably defined in the interpretation section, and indeed it is. The pages have to be turned back to see exactly what that definition is. It is one third of a page long. This back-and-forth process is not found in many other sorts of writing. It takes much practice to get used to it. It means that the full import of a provision can only be derived after quite a lot of work. It is a bit like doing a jigsaw puzzle.

There is another reason why statutes are not a good read. Parliamentary Counsel are constrained, in that their job is simply to set out the law and nothing else. They just set out the rules without further elaboration[5]. Parliamentary Counsel do not have the luxury of explaining the reasons for the rules they so precisely set out. Nor can they explain the same point in several different ways to make sure the message is understood: they do not say "or, to put it another way". Very occasionally they use examples, as we have seen, but it is only very occasionally. The Act is devoid of context and colour. Its very starkness makes it difficult, particularly for a newcomer, to see on reading it how the Act will fit into the social framework, and how it will affect the world that they know.

In other words, statutes are not a gripping read. For those unfamiliar with them they are dull.

The second problem students find with statutes is related to the first. You have to read a statute very carefully. Every word has a job to do. This is even truer now than it used to be in the old days when statutes sometimes contained many surplus words. So statutes require close reading. They are an intellectual challenge, and you cannot skim-read them. I recently came across this paragraph in a guide for legal researchers[6]:

> "Read the statute three times and then read it again … Assume all words and punctuation in the statute have meaning. It is tempting to skip words that you don't quite understand. Don't do it".

Another instruction manual for statute readers gives two words of advice: "Slow down"[7]. Most students, indeed most people in general, are just not used to really close and careful reading. They are used to quick reading to get the sense. In the law, too often the sense derived from a quick read is not the right one, or at least not the complete one.

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4 Dale, *Legislative Drafting, a New Approach* (Butterworths London 1977) 332.

5 Sir Christopher Jenkins *Helping the Reader of Bills and Acts* (1999) 149 New LJ 798.

6 Nolo: *Help with Legal Research* http://www.nolo.com/statute/index.cfm

7 Maranville, *How to Read a Statute: MAP it!* http://courses.washington.edu/civpro03/helpful_hints/StatuteMAP.doc

All of this is exacerbated in statutes. To understand a statutory provision you need to read the statute as a whole. It is dangerous to take a section out of context. If you do, you may fail to discern the overall purpose of the Act, which can and should influence the meaning you give to one of its sections. More importantly, you may fail to see how one provision of the Act relates to another. How often does it happen that the meaning you attach to section 21 of an Act on the first reading has to be modified, or even abandoned, when you read on and encounter section 36? I used to tell my students that that is the most important rule to reading statutes. If that was the only message they took away from my legislation class, I used to feel it was worth something. And yet it is a trap I still fall into myself when I am in a hurry. I did so recently to my embarrassment when I was critiquing a draft bill. I simply failed to see that one clause required a restricted reading in the light of another.

So our students must learn to read the whole Act. Yet there is a real problem here. Some Acts are so long that the exhortation to read them as a whole is given in hope rather than any real expectation. In New Zealand the Local Government Act 2002 is 437 pages long. Can I seriously expect that any law student will read every word of it so as to be confident of the meaning of section 21? Can I really expect any practitioner to do it, or even any judge? Here practicalities begin to overtake us. The most one can suggest is that one needs to be thoroughly familiar with the structure of the Act so that one knows where to look for other provisions that might be relevant. I do not like long Acts.

We come now to the third problem. Even when our new student has laboured over an Act of Parliament for hours and arrived at a perfectly sensible construction of the relevant provisions, he or she may find that that is not the end of it. The true meaning of the relevant provisions may be affected in a very material way by things outside the Act itself. An Interpretation Act, for example, may give a meaning to words like “person” or “public notice”, which our novice would never have dreamed of. There may turn out to be another Act on the same subject-matter, and the interpretation given the Act under study may have to be dovetailed with or reconciled with the other. Reconciliation of two apparently inconsistent provisions in different Acts causes more trouble than almost anything else. And then in New Zealand we have a Bill of Rights Act which requires that other Acts must, if possible, be read in conformity with it. So, an apparently clear answer which our student has derived from a particular provision in the Act may have to be modified because it impinges, say, on the freedom of expression guarantee in the Bill of Rights Act. Newcomers find this frustrating and difficult. Very few other sorts of writing require you to continue to cross-check with documents outside the one in question to make sure you get it right. Every statute is part of a much larger legal landscape.

Then we come to the fourth problem. It is even more fundamental than the ones I have talked about, and I fear that generations of law teachers must bear some responsibility for it. We law teachers have for far too long filled our students up with case law, and in particular the common law. In the first year of their law degree students are introduced immediately to judicial reasoning, which includes the rules of precedent, extraction of the ratio decidendi of the case, techniques of distinguishing cases, and the judicial art of reasoning to a conclusion. *Donoghue v*

Stevenson and *Rylands v Fletcher* make their appearance very early on in legal studies. As like as not a lot of time will be spent on the rules of postal acceptance in the law of contract, so that one can see how the judges develop the law on the basis of earlier precedent. Students like this better than reading statute law. The reasons are not far to seek[8].

First, the cases have interesting facts. They are about finding a dead snail in a ginger beer bottle, or about a man whose reservoir leaked onto his neighbour's land. And who can forget Mrs Carlill sniffing a Carbolic Smokeball for 14 days and then catching the flu? The cases tell interesting and sometimes very amusing stories. Acts contain only abstract propositions.

Secondly, the judges give reasons for their decisions. You can see them arguing to a conclusion and you may disagree with their arguments. You can debate about it for hours. There is something to get your teeth into. Acts do not give reasons.

Thirdly, there is often an interesting challenge in working out exactly what rule a case stands for. That is particularly so if there are multiple judgments in a superior Court and each judge uses a slightly different line of reasoning to reach the same result. There is usually no single form of words in which the rule can be expressed. Case law is based on principle and analogy rather than on any strict form of words. Acts contain predetermined rules in a set form of words.

It is for these interesting reasons that what was called the case method of teaching became popular. It still is in many quarters. It was devised in the US and came to Britain in the 1960s. Teachers give their students cases to read and then discuss them, Socratic style, in the ensuing class. If it is well done, interesting debates can ensue. An academic called Sparrow explains it thus in an article he wrote in 1967[9]: "The teacher of law should make maximum use of the teaching tool which is uniquely available to him - the case … The student is first presented with a recognisable real situation rather than an abstract principle." Sparrow then quotes a statement by Holmes describing the case method of teaching law in the United States

> "The case method puts body on the principles which otherwise would be nothing more than a throng of glittering generalities, like a swarm of little bodiless cherubs fluttering at the top of one of Corregio's pictures."

All of this reveals a teaching preference for the single instance rather than the abstract proposition, for the interesting fact situation rather than the generality. Yet, as I have said, statute law is all about abstract propositions. It contains rules which are pre-determined, set out in words which are indisputable. Unlike the common law the words are everything. As I have said, no

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[8] See the interesting analysis in Fitzgerald *Are Statutes Fit for Academic Treatment?* (1970) X1 JSPTL 142.

[9] Sparrow *Teaching Method: A Basis for Discussion* (1967) 1 J1 of the Association of Law Teachers 37. Yet this Socratic method of teaching cases was quite new in Britain at that time. Before then the teacher had still relied on cases, but just *described* them: see JC Smith *The Case Method of Teaching Law* (1967) 1 J1 of The Association of Law Teachers 17.

reasons are given as to how and why the rules got there. The Act is abstract and bloodless. The student does not have the challenge of formulating the rule; this has been done by Parliament.

What I am afraid tends to happen by way of compensation is that when there is litigation on a provision of a particular statute, the teacher seizes eagerly on the case, and sometimes concentrates more on that than on the words of the statute. There are obviously problems with this tendency to seek refuge in the case. One of them is that it can skew the study of the statute to place emphasis only on those provisions which have been litigated, which is dependent on accident. It also has the effect that sometimes students will cite the words of the judge explaining the Act rather than the words of the Act itself.

The concentration on cases has another difficulty, in that it assumes that our legal system revolves around the court. It is almost as if nothing is real law until it has been pronounced on by a court. There used to be a school of realist jurisprudence in the United States which came very close to endorsing that proposition. Yet, as we all know, most provisions of most statutes never get anywhere near a court. Some entire statutes never do. Yet they are the law, and have to be worked with on a daily basis by administrators and others, some of whom do not have a legal training. At the university where I worked good and able people in our registry referred to a multitude of statutory provisions all the time. Is this student entitled to enter university? To what allowance is he or she entitled? What kind of report does the university council have to file with the Ministry? How does academic freedom affect the employment rights of university staff? There are no cases on any of these things, or at least on very few of them.

The failure

So those are some of the problems which are faced by students, and their teachers, when confronting statutes. Statutes now occupy the vast majority of the legal universe. Teachers have to cope with them better, and they have to make their students much more familiar with them. It is remarkable how long it has taken us to come to that obvious realisation.

In general, university law schools have not responded well enough. There have been exceptions of course. As early as the 1920's a few American law schools had innovative courses in legislation[10], although they tended to be the products of particular professors and did not survive their passing. It was not until 2006 that Harvard Law School introduced a segment on legislation in its first year law course. Dean Elena Kagan said: "When you haven't changed your curriculum in 150 years, at some point you look around."[11]

In the UK and the Commonwealth there seem not to have been any innovative courses until very much later. In 1930, an English academic named Hughes foreshadowed the problem. Writing in the *Journal of the Society of Public Teachers of Law* he noted with alarm the growing incidence

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[10] Eskridge The Three Ages of Legislation Pedagogy (2004) Legislation and Public Policy 3.

[11] *The New York Times* October 31 2007.

of statute law[12]. He acknowledged, apparently with some reluctance, that law teachers would have to deal with it. He said:

> "Must we become mere expositors of a series of propositions with a facility for mechanical cross-references as our principal stock in trade? If this is to be the result of increased legislative interference in the growth of law a profound effect will result to the teaching of English law and the spirit of English law itself."

To give Hughes his due he examined "the feeling which I have had for some time, that if statute law increases the rational teaching of law must give way to the dull routine of expounding a code", and concluded that it might be possible to bring life to the subject by finding principles, even rational principles, underlying the dull and uninteresting propositions in the statute. Nothing much had happened by 1967 when Master Jacob, a Master of the English High Court, gave a lecture in which he noted the Law Commission's proposals to codify the law of contract[13]. He said:

> "If such a code is produced it may well revolutionise the methods of teaching contract. It will be necessary to apply new methods of teaching law without the cases. This may have a snowball effect in other branches of the law where the law may also have to be taught and learned and indeed practised without the cases."

There were eventual advances in some places. Writing in the *Statute Law Review* in 1980[14], David Miers and Alan Page outlined a far-sighted course they offered at Cardiff. But in 2007, Oliver Jones, in a very nice article[15], said that even by that time some law schools, including some of the most prestigious, "provide virtually no instruction in this area". At his own alma mater, he said, there were "roughly two lectures and two tutorials" on statutory interpretation.

What do we do?

Let me explain my ideas on the subject. I tried to put some of them into practice at my old university. There needs to be far greater instruction for students, not just in statutory interpretation, but in statute law generally. More importantly, students have, if possible, to be made *interested* in the subject.

A number of things need to be recognised when teaching students about legislation.

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12 Hughes, *The Teaching of Statute Law* (1930) JSPTL 11.

13 Jacob, *Legal Education – The Next Ten Years* (1967) 1 J1 of The Association of Law Teachers 4.

14 Miers and Page, *Teaching Legislation in Law Schools* (1980) 1 Statute Law Review 23.

15 Jones *Statutory Interpretation: The Case for a Core Subject* (2007) 5 Journal of Commonwealth Law and Legal Education 85. In *Jurisdynamics*, a blogsite, Professor Jim Chen of the University of Louisville in 2006 described the failure to teach statute law properly as "perhaps the worst pedagogical oversight in American legal education." He said that "very few law students receive any systematic education in reading statutes."

- First, statute law needs to be studied as a subject in itself, and not just picked up by osmosis in learning subjects like criminal law and land law.
- Secondly, one must correct the previous bias towards common law.
- Thirdly, teaching statute law involves a lot more than just teaching students how to interpret statutes. Inevitably interpretation will form a significant part of any course, but it should never be thought that it is the whole of it. The study of Legislation is about a lot more than just interpretation.
- Fourthly, one will inevitably refer to decided cases. One needs to do so to explain the rules of interpretation, and simply because courts at the end of the day are the authoritative interpreters of statutes. But one must get away from the idea that the cases are the whole, or even the most important part, of it. That is the old court-centric approach which engulfed us for far too long.

It also pays to think occasionally of what the students will do when they graduate. Some will go into practice and become litigators, or act for clients who are in dispute with others. To them interpretation and the adversarial process will be very important. But not all students follow that track. Some will need to explain a piece of new legislation to their clients, and summarise for them what they will have to do to comply with it. Others may be asked to critique a bill for a client who wants to make a submission to a parliamentary committee. A number will end up in the Government service, where they may be involved in policy development for a new statute. Some may become the parliamentary counsel. Some might even end up as members of Parliament who cast their vote on the parliamentary counsel's final product. By no means all law is about dispute resolution.

In what follows, I outline one way of approaching the task of teaching legislation to students. We were moving in this direction at the University of Canterbury when I taught there. But more needed to be done.

First year: introduction

One has to get in early. One has to introduce students to statute law in their first year, preferably before they have studied any other legal topics. But here you run into an immediate problem. As I intimated earlier, in their first year students know little or no law. There is no point confronting them with a complex Act about some commercial matter, because they do not know enough about the substantive law to make any sense of it, and they cannot be expected to. So you have to pick homely examples such as an Act dealing with dogs that bite people, or an Act which prohibits the casting of litter on public beaches. There are enough such simple Acts around to at least make a start. In that first year one can introduce the students briefly to how statutes are made, so they know something about policy development and the parliamentary process, and are acquainted with the fact that in our country at least the public can contribute to this by making submissions on bills. They then have to be shown how to read a statute carefully. There are different ways of helping them with this. Some teachers believe they should be told to break up a complex section

into bite size pieces, although I have never been quite so sure about that: small bites can sometimes lose the flavour of the whole. Here will come the first warning that the statute must be read carefully and closely, attention being paid to every word, and read as a whole (with the slight reservation I mentioned before). The students can be introduced to the techniques of interpretation and to the primacy of words and their purpose. One can interest them with examples. One should not stint this introduction, and one should not allow common law reasoning, important though it is, to occupy the lion's share of the first year course as commonly now happens. In my view, statute law should be allocated at least equal lecture time to common law, and preferably more.

Second year: substance

Successful students then proceed to the second year where they will study fundamental legal topics such as criminal law, land law, contract, and tort and so on. Even though statute law will not be a subject in itself in that year they will begin to acquire some familiarity with it, particularly in criminal law and land law which are substantially statutory in our country.

Third/fourth year: a course in legislation

It is in the third or fourth year of the degree that I think there should be a full course on *Legislation*. We had one at the University of Canterbury but it was optional only, and by no means all students did it. I have argued elsewhere that a legislation course of this kind, which takes statutes as a study in themselves, should be compulsory. I still hold that view. Statute law must be a separate subject of study. By the third or fourth year students have a far better grasp of substantive law, so one has, as it were, more material to work with. Such a course needs to combine practicality with academic challenge. The process of familiarising people with statutes does, I am afraid, involve a certain amount of nuts and bolts. But the process of familiarisation must also pose deeper questions. Students will rapidly lose interest if it does not. This is a large part of it: one must try to capture the interest of the students and challenge them.

Here is an outline of what I tried to do when I was teaching the course. Others will doubtless wish to do it differently[16]. The course I taught had four elements.

The making of statutes

The first part of the course was an extended study of how statutes are made, building on the knowledge gained in the first year. When do you need an Act of Parliament? Are there some

[16] Other models are found in the articles by Oliver Jones (n 13); Miers and Page (n 12); Kay Goodall, *Teaching Statutory Interpretation: citings of NESSSI in Scotland* https://dspace.stir.ac.uk; Francis Bennion www.francisbennion.com 2007/nfb/005.htm; Chai R. Feldblum *The Joy of Teaching Legislation* http://www1.law.nyu.edu/journals/legislation/issues/vol7num1/feldblum

policy goals which are best accomplished by means other than legislation? How do we know which goals those are? We then need to study where the policies for statutes originate; how policy is worked through and refined; and how the Government is persuaded to accept it. Then there are all the twists and turns it must go through in the ensuing parliamentary process. In New Zealand, that involves a great deal of public input, and with our system of mixed member proportional representation a fair amount of political manoeuvring as well. Many documents are generated in the process: Cabinet papers, explanatory notes, commentaries of select committees, and reports of parliamentary debates. When I was a student we learned nothing about this at all. It was seen as not being within the purview of a lawyer. It was the business of historians and political scientists. Knowing about this *is* a lawyer's business. It serves a number of purposes.

- First, it brings the Act to life. It becomes more than just words on a piece of paper. When I was a law student we were never told how the words got on the paper. They might as well have fallen from the sky.
- Secondly, the surrounding documents - the Hansard debates and so on - can often supply what I have said is missing in the Act itself, that is to say the reasons for it, what it is designed to achieve, and how it will fit into the social fabric. Intelligent students usually want to know the answer to the question why. Why was this Act necessary? What is it for? One can often find the answer to such questions in the associated documentation.
- Thirdly, this surrounding documentation is now widely used, in my country at least, to assist in the interpretation of Acts. There is still some controversy as to how proper this is, and from time to time one hears constitutional objections to the practice. I shall talk about them a little later. It is important for students to realise that, whatever one thinks of the practice, the reliability of such information is variable. Some of it, particularly that generated in the early stages of a process, can be downright dangerous if there have been significant changes to the bill later. It is nice to have juicy current examples of bills which have just gone through the process. Students have (hopefully) read about them in the newspaper and are interested to see the obstacles they have had to negotiate in parliament, how their shape has changed, and how the original explanatory note may have got out of date.

Another thing this study of the legislative process accomplishes is to let students see why our statute law is a collection of individual bits and pieces rather than a coherent code. Most Acts originate in a particular Government Ministry or Department. That has been happening for generations. These Ministries and Departments tend to operate as silos, and there is sometimes a failure to see across the whole spectrum of government. Given that we have 100 years' worth of Acts on our books, many of them reactions to a particular problem of the time, it is no wonder that there is the occasional inconsistency, and no wonder either that some pieces do not fit neatly into the jigsaw.

2. Drafting the legislation

Next, I think legislative drafting is a useful subject of study. There was a segment about that in the course I taught. When students come to university most of them have no idea who drafts Acts of Parliament: they have simply not thought about it. They would almost certainly never have heard of the Parliamentary Counsel Office and, even if they had heard the name, they would not know what it was. Few people do. I am thoroughly ashamed to say that until I came to teach this course I did not know either.[17]

It is an interesting, and I think important, question as to why the traditional drafting style was as it was. Why on earth would anyone ever want to draft anything as tautologous, complicated and overwritten as section 64(1) of the Trustee Act? And it is by no means the worst the example. I have heard it suggested that parliamentary counsel were once paid by the page. (If that were the case they would still be doing rather well, because despite the new economical style of drafting many modern acts are in fact longer than their forebears. This is not because they are more wordy - the very reverse - but because they deal with more things. Law is becoming more complex). The real reason, I think, for the old style is that judges used to be hostile to statutes. Like law teachers they preferred the common law. It was once said that judges seemed to think that statutes always changed things for the worst, and needed to be interpreted as narrowly as possible, and so as to depart from the common law as little as possible. So to be sure that the parliamentary counsel's message was not diluted or misunderstood it was thought prudent to leave absolutely nothing out, to leave nothing to the imagination, and to leave no possible gaps, even if this meant using ten words where one would have done. Today, when commonsense purpose-based interpretation is much more the order of the day, some of the old drafting seems almost comical in its wordiness. The early parliamentary counsel felt they had to make it judge-proof. Perhaps this fear is still not an entirely irrational one?

The modern move to plain English has been very welcome indeed. Yet, as I indicated before, there still is a line beyond which it is unwise to go. Legal English needs a certain degree of dignity. Plain though it should be, it is still legal English and not pulp fiction. But dignity can be a bit dull. (I once saw an Australian Bill dealing with credit contracts which provided for a certain consequence if a possessor of goods "got rid of" them rather than "transferred or disposed of" them. It did not sound right, and as far as I can tell it was never passed into law.) I discovered that even if students find statutory language dull, they love talking about why that is so.

In a discussion of drafting one can also delve into other deep and difficult questions. One such question is: what best belongs in an Act of Parliament and what best belongs in regulations? Where, in other words, lies the act/regulation divide? It is sometimes described as the distinction between principle and detail, but that is not nearly good enough. In 2006 I spent a whole day with the New Zealand Parliamentary Counsel Office, and we tried to have this matter out, and produce a set of guidelines. We did it, but I don't think any of us feels that the result is the final

[17] In those days it was called the Law Drafting Office.

answer. [18]

It is impossible to provide absolute rules about this. Rather there is a series of factors one must weigh in the balance. What is such high policy that it should be argued in a transparent democratic institution like Parliament rather than being done by the executive behind closed doors? Yet even some quite important provisions may need to be made so quickly that the process of parliamentary law making will be too cumbersome and too slow. How does one accommodate this? What things are so technical or so specialist that they would waste parliament's time? What human rights and freedoms are so important that they should be a matter of parliamentary enactment rather than executive regulation? Some very difficult questions can arise and sometimes there is simply no unanimity about them.

There can be another question, not entirely unrelated to this first one, as to what matters are best suited to general principle style drafting, and which matters are best spelled out in detail. In other words what legal topics are best suited to the broader coverage and flexibility, but greater uncertainty, of general principles, and which to the greater initial certainty of detailed propositions? Which is the easiest for the public to read and understand? There is a view in some quarters that general principle drafting and the plain English movement go together, but this is often not so. Detail can be expressed in plain English too.

And then there is the value or otherwise of purpose clauses. Should we have them in Acts of Parliament? Are they generally so broad-brush as to be useless or misleading? (I have heard some called "T-shirt slogans"). Are purpose clauses (and Acts' titles, come to that) ever used as a kind of shameless political advertising? Or do they, if well done, focus the mind of the reader, and even the parliamentary counsel, in a beneficial way? My own view is that if we are going to adopt a purposive approach to the construction of statutes it can be more helpful to state the purpose in the Act rather than let interpreters guess at it. Some of our senior judges have said they like the practice.

There are the sorts of topics I tried to interest students in during the drafting part of the course. They did not emerge as expert parliamentary counsel, but they did, I hope, come out with an interest in the subject.

3. Interpretation

I have been insistent so far to say that a Legislation course should not be solely about interpretation. But obviously a good part of it has to be. The purposive approach is now the order of the day, and so it should be. The old insistence on the letter sometimes used to lead to manifestly unsatisfactory results. Responsible use of the purposive approach deserves a good deal of discussion in any student course, but "purpose" cannot be allowed to descend into sloppy

[18] The guidelines appear in Legislation Advisory Committee, *Guidelines on Process and Content* (revised ed 2007) Chapter 10.

thinking: unless carefully controlled it can have that tendency.

A study of interpretation can get one into some very interesting questions about language. What is the relationship between purpose and meaning? Remembering that one's job is to interpret the words used, how is it that sometimes words can convey more or less than they expressly spell out? How far can the purposive approach allow you to effectively correct errors of expression? When does interpretation cross the line into amendment which of course is not acceptable? Linguists and lawyers should talk to each other more.

In all of this, one struggles to make students confident and competent readers of statutes, while at the same time to keep them thinking and enquiring. It is important to find or think up good examples for discussion, hypothetical or real, and there are many different ways of organising that ensuing discussion. I don't think any two teachers of interpretation teach it the same way, but it requires a lot of the teacher's time. The object at the end of it is to produce a graduate who is beginning to be an assured reader and interpreter of statutes, who can identify *why* a particular provision is causing difficulty (very important)[19] who is getting to know and handle the factors which influence the process of interpretation, and who is able to argue persuasively to a conclusion. It takes long practice to acquire real proficiency.

I spoke before of challenge. Apart from the purposive approach, three new things have hit the interpretative scene recently, and they can provoke much discussion. One of them is the growing importance and currency of human rights legislation, both domestically and internationally. We in New Zealand have a *Bill of Rights Act*. In the UK, the Human Rights Act effectively brings the European Convention of Human Rights into the domestic legal system. Human rights legislation often says that other statutes should if possible be interpreted consistently with the rights and freedoms in the Bill of Rights or Convention. We are still in New Zealand sorting out how far that entitles an interpreter to go. We are also wondering how Bill of Rights consistency is to be reconciled with our other major rule of interpretation (in section 5 of our Interpretation Act) that one should adopt a purposive interpretation. Those two approaches will usually be compatible, but may not always be. They come at the problem from different starting points. Dame Mary Arden has recently called them the "Agency Model" and the "Dynamic Model."[20] You will know that recently in the United Kingdom there have been some very far-reaching decisions of the House of Lords which give great weight to Human Rights consistency at the expense of parliamentary intent. The cases on this are not entirely consistent, but the more extreme of them go further than traditionalists would ever have thought possible. It seems to them to involve a mangling of language. The New Zealand courts have been a lot more timid, and they will only allow a rights-consistent interpretation if the words of the Act in question can

[19] For example, is it because a word is ambiguous or vague, or because of an internal inconsistency within the Act, or because the most natural meaning of the words leads to an unsatisfactory conclusion?

[20] Dame Mary Arden, *The Changing Judicial Role* (2008) 67(3) CLJ 487.

reasonably bear it. I must say I am with them on that. The fresh young minds of the students sometimes take a different view on this. They used to think I was old-fashioned and unimaginative. It is the stuff of really good debate.

The second relatively recent development, of course, is the use of parliamentary material, such as Hansard and reports of parliamentary committees, to aid the interpretation of statutes. Once that would have been thought to be highly irregular, not to say downright unconstitutional. What matters, the detractors say, is the intention of the parliament which passed the Act, which can only be found in the words of the Act. Hansard merely contains the thoughts and desires of ministers, their advisers within the executive, and individual members of Parliament. None of them is speaking for parliament. That purist view has theoretical merit, but in this country at least has been trumped by practical utility. Sometimes what one finds in Hansard and other extrinsic materials can be very useful. It can make the penny drop. Indeed the dangers of using such materials are not so much constitutional ones as practical ones. One constantly has to keep an eye on the reliability of the statements one is relying on. As I mentioned earlier that is why it is so useful to know and understand the parliamentary process. It helps one sort the grain from the chaff. One has to be very careful when explaining all this to students to emphasise that in the end it is the words of the Act which matter. Parliamentary materials are only an aid to understanding, and not an end in themselves. They cannot be allowed to distort the Act's text.

The third matter which is assuming increasing importance recently is the effect of the passage of time on statutory interpretation. I do not know why this has taken so long to emerge as an issue, because it has always been with us. Statutes, like no other documents, are built to last; they are intended to regulate behaviour for years, perhaps even decades, into the future. During that time things can change: technology, society, moral values and the surrounding law. Things happen which the parliamentary counsel and the parliament of the time could not possibly have foreseen. How could the writers of the *Copyright Act 1962* have foreseen the explosion in electronic technology which followed it? The internet and the capabilities of computers were not even dreamed of then. Yet for some thirty years that Act had to deal with and regulate these things. In applying statutes to these new developments, is one guided by the intentions of the original parliament, or by the way an ordinary reader would read the words of the Act now, or by the interpretation which gives the best practical result in the modern world? Should the interpretation of an old Act be affected by changes in moral and legal values? That is a tricky question, and I am not comfortable with it. If a 1920 Act refers to a "family", is that confined to the narrow concept of family as it was understood in 1920 (relationships by blood or marriage) or can it extend to the various forms of cohabitation which are now commonplace? In other words has the word shifted in meaning the last 80 years? Can the *meaning* of a word in an Act ever change over time? The limits of what has been called the ambulatory approach are not entirely clear. This is fascinating but somewhat dangerous territory. The students could get quite carried away by it. (I fear that a few judges have as well).

4. Other matters

Finally, this legislation course which I am describing to you tried to deal with what Oliver Jones

has rather aptly called "the other stuff"[21]. This is shorthand for a range of matters which are not really so much to do with interpretation (although they are to some extent) but which are integral to statute law and which do not have an obvious parallel in the common law. They are part of the tools of trade of anyone working with statutes. There is a little world of knowledge to be explored here, and it is an obscure world to many people. I have time only to sketch some of the items in outline.

One is the coming into force of statutes. Newcomers are usually surprised (very surprised, in fact) to hear that many Acts of Parliament do not come into force the moment they are passed by Parliament. Many have a deferred commencement date. Some will come into force only when the Governor-General by order-in-council so orders. There has been much debate in New Zealand over the desirability, and indeed the constitutional propriety, of this latter device. Is it not Parliament itself which should decide when a law comes into force? Is not Parliament divesting itself of the power to make law if it delegates coming into force to the executive? But we all know that, theory notwithstanding, such a process is sometimes necessary for good pragmatic reasons. This is another area where pragmatism wins over theory and logic.

But the order-in-council device nevertheless raises some interesting issues. Can a Government decide to let the incipient Act lie and not bring it into force at all? Apparently no, but it can be very difficult to discern the difference between deciding not to activate it at all and letting it lie dormant for a very long time indeed. We have Acts in New Zealand which have been passed, and then lain dormant for 15 years before being repealed without ever having come into force. Another question: having brought an act into force by order-in-council, can the change its mind and revoke the order? Certainly not. But what if the revoking order is made before the first one took effect? Probably, at least if it is to correct a mistake. Can an Act not yet in force have any legal effect? Well, yes and no. No-one can be penalised or have their rights taken away if the Act is not yet in force. But it is not unknown for courts to refer to such Acts, and even to allow them to influence decisions. Most Interpretation Acts have a provision to the effect that certain powers, such as powers of appointment and the like, can be exercised in advance of the legislation coming into force so that the Act can hit the ground running, as it were, when the Act is brought into force. The boundaries of that power are far from clear, and keen administrators and officials sometimes jump the gun in their anxiety to get things moving. This has been the subject of some very contentious litigation in New Zealand.

Let us now move to the other end of an Act's life. Tindal CJ once said "The effect of repealing a statute is to obliterate it completely from the records of Parliament as if it had never been passed."[22] That is utterly misleading. Students are often surprised to hear that repeal usually does not kill the Act for all purposes. The transition from repealed Act to new one is one of the

21 Above n 13.

22 *Kay v Goodwin* (1830) 6 Bing 576 at 582.

most fraught areas in the whole of our law. Most interpretation acts contain a default provision to the effect that rights acquired under the old Act continue after its repeal and can continue to be enforced then. However that is far more difficult to apply than it is to recite. Such provisions are always subject to context. They are linked with notions of retrospectivity. Their application is often very unclear. Good repealing acts usually contain transitional provisions which spell out expressly what is to happen, but I do not know of any type of statutory provision that has caused so much trouble. It is strange that it should be so. For some reason transitional provisions seem to test the foresight of parliamentary counsel more than any others. This topic is one of the most complicated in the world of statutes, and it is also one of the hardest to teach because it is hard to keep it interesting. Here is a transitional provision from the *Local Government Act 2002* (NZ):

> **292 Existing charges**
>
> (1) This section applies to any security interest that, immediately before the commencement of this section, was registered under section 122ZH of the Local Government Act 1974.
>
> (2) Every security interest to which this section applies must be treated as a prior security interest for the purposes of Part 12 of the Personal Property Securities Act 1999, and that Part applies, in relation to every such security interest, as if –
>
> (a) every reference in that Part to prior registration law were a reference to section 122ZH of the Local Government Act 1974; and
>
> (b) the transitional period were the period of 6 months commencing on the commencement of this section.

Imagine trying to make that sexy for students. I pretty much gave up trying. But it is so important.

The last topic among "the other stuff" is amendment. Once again, it has no ready parallel in common law. In New Zealand textual amendment is almost always used, but not absolutely always. The textual method is the best I think, but it is one of the biggest contributors to a messy statute book. If an Act has pieces of band aid stuck onto it year after year it can become incoherent. It is a question as to when it is better to amend and when one should repeal the Act altogether and start over again. That is sometimes not easy, in that politicians are often concerned that if one revisits the whole Act there may be pressure to revisit policy. There are theoretical questions too; can a significant amendment to an Act change the way the remaining provisions of it should be interpreted?

Conclusion

I have said quite enough. I am not sure of the answer to a lot of the questions I have posed, but one thing I am very sure of. We have to deal with statute law better than we currently do in our educational institutions. Students have to be made *thoroughly* familiar with it. They have to be comfortable with it. As far as possible they should become interested in it, because interest is the key to understanding. If they become practising lawyers, they will work with it every day of their

working lives. We are way beyond the stage when statutes were a tiresome add-on to the common law. Statute law is now the bulk of our system and far and away the most important part of it. It is the instrument by which a Government gives effect to its policies. I end by quoting Francis Bennion. He said[23]:

> "Nowadays you cannot be any sort of competent lawyer without being a statute lawyer, since legislation provides the framework for almost everything lawyers do."

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[23] Bennion, F. *Understanding Common Law Legislation: Drafting and Interpretation* (OUP 2001) 8.

The long march: pen and paper drafting to E-publishing law[1]

Don Colagiuri SC and Michael Rubacki[2]

This paper examines the development of one-stop legislative drafting and publishing offices in New South Wales and Australasia generally.

It explores the changing technologies and policies that have affected drafting offices over the last 30 years. It focuses on the consequences for public access to law, the status of paper versus online documents, as well as the resource requirements and the general pros and cons for legislative drafting offices embracing the combined roles of data creator, manager and publisher.

Part 1: Drafting to publishing legislation—the long march

1880-1980 pens and hot metal

The legislative drafting and publishing process was largely the same for the century, and even longer, leading into the 1980s. It came with its own tempo: a generally leisurely one where legislative counsel used a pen or dictated their work. The documents languished in the in-trays of typing pools and compositors and went through a labyrinth

[1] This is an edited version of a paper given at the CALC conference held in Hong Kong in April 2009.

[2] New South Wales Parliamentary Counsel's Office. Michael Rubacki has since retired from that Office.

of printing production processes at an industrial strength Government Printing Office. The process was characterised by multiple handling and transformations, each one introducing a new element of risk and requiring formal proofreading or close inspection. The process was geared solely to producing a paper publication, generally a B5 pamphlet, folded and stitched, later to be sewn and bound as an annual collection in a cover of buckram or half calf.

The data resided in print-based repositories, hot and later cold metal, held closely and firmly by the printers. Management of the production process required significant interaction by both the drafting office and the Parliament with the printers. Printed legislation did not significantly change in appearance during this period and users needed the skills of a law librarian to use various tables and guides to work out the status and currency of the law. Records in drafting offices were entirely paper-based and featured paste-ups of amended legislation and elaborate card systems.

There was very little difference across the Australian jurisdictions as the technology used for print production was so industrial in scale, and controlled by centralised printing offices.

1980s: technology stirs

Electronic typesetting and word processing systems emerged in the 1980s although these were proprietary and relatively expensive. In New South Wales a shared Data-General/Penta system was installed by the Government Printing Office (GPO) in the Parliamentary Counsel's Office (PCO). GPO trades people worked in the PCO and formatted documents that had been key stroked by typists and other support staff. The system was linked to the head office 2 kilometres away and the documents were proofed back to the PCO where they were proofread and sent back for revision and final printing. The first fax machine was installed to speed up the transmission of proofs. This shared system was refined and extended and senior legislative counsel started using it. All drafting counsel who could not already do so were bussed to the local technical college to learn to touch type.

One benefit of the shared system was that it focussed attention on the typography of legislation and some of the unnecessary complexity. For example, sidenotes were removed and collected as historical endnotes and the dual pagination of annual volumes was abandoned. It also brought new skills in terms of IT and printing technology into the office. One of the early experts in electronic printing technology from the GPO has been the New South Wales IT Manager at PCO for the last 20 years. There was a similar cross-over in personnel in some other jurisdictions.

1990s: technology unleashed

The arrival of desktop personal computers and word processing software marked the

rapid decline in traditional typesetting and printing. Legislative documents could now be created, stored and reused on the one site. Bulk printing was still a challenge as laser printers and high-speed copiers remained cumbersome and costly.

In the case of New South Wales, the production process changed dramatically in 1989 when the Government of the day suddenly closed down the GPO (with 800 staff and vast premises on what is now part of Darling Harbour entertainment and tourist precinct). In 1989 the PCO redeployed 4 staff from the GPO and acquired two high-speed copiers to print Bills. These were heavy behemoths that cost a fortune and needed constant servicing.

During the early 1990s the PCO developed a legislative drafting and publishing system using WordPerfect 5.1 and CAPS (a Unix-based typesetting system) to produce legislative documents for printing, using the in-house copiers. This still involved double handling and the checking of "proofs". The advent of a Windows based version of WordPerfect and the development of in-house styles and templates enabled the PCO to abandon the CAPs system and the dual process. Full formal proofreading in pairs was at last buried. The PCO no longer employed a team of part-time readers but the staff establishment was already shifting from one of mainly legislative counsel and a small team of general support staff to a dual focussed establishment of legislative counsel and publishing specialists and support staff with well developed IT skills.

Two other features also emerged at this time: the redesign of printed legislation and the creation of an electronic collection of legislative data. In New South Wales, both features were aided by having control over the technology and production processes. The redesign of printed legislation (in 1995) coincided with a high point of interest in plain language, and New South Wales piggybacked on this to simplify the layout of legislation and make it more navigable.[3] The timing of this review meant it was entirely focussed on the paper presentation and not the online rendering. Several of the new features (particularly clause numbering and headers) were adopted in other jurisdictions.

The legislative data collection (in WordPerfect) was built up throughout the '90s so that it began to replace the traditional A3 paste-up master sets of current legislation as the "source of truth" for the PCO. The data was captured and maintained in an up-to-date state by a group of 4 staff and used as the source for paper reprints and for drafting purposes. From 1995 the source data was also made available for sale and reuse. The complete lock-in with WordPerfect became a restriction as the volume of data grew and the product lost its place in the market (most Australian jurisdictions migrated from WordPerfect to Word during the 1990s).

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[3] *Review and redesign of New South Wales legislation: A discussion paper*. A joint project of the Parliamentary Counsel's Office and the Centre for Plain Legal Language. June 1994.

1995 milestones

1995 was a significant year for New South Wales as copyright in legislation was waived and it was finally accepted by the Government that there was not a pot of gold hiding in the sale of electronic legislation. A modest, cost recovery price was fixed for access to legislative data and this has not changed much since. More significantly, the Internet was becoming widely accessible and AustLII[4] launched its free online services. Similarly, the Commonwealth's in-house electronic access system SCALE, which was very advanced for the time, was planning to go live to the web the following year. In 1995, the first meeting of the annual IT Forum was held at which staff from Australian and New Zealand legislative drafting offices met and exchanged experience and expertise.

Also in 1995, the Victorian Government privatised its printing operations. The Chief Parliamentary Counsel formally has the title and role of Government Printer,[5] although the work of bulk printing and distribution is all performed externally via contracts with commercial organisations. This is, we believe, quite unique, but combining the two roles is quite logical if the function of the Government Printer is to only publish legislation and the Chief Parliamentary Counsel just directs the outsourced production work.

Late 1990s: online access and publication arrive

Internet access and e-mail were introduced in New South Wales and all staff given access by 1997. (This facility, especially e-mail, is now so integrated and central to core business that I suspect staff would go into shock and would have to be sent home if it failed for more than a couple of hours. A back-up email server is being planned.)

The latter part of the 1990s saw the development in Tasmania of the highly sophisticated Enact system based on SGML[6] and a growing interest in bespoke systems for legislative drafting and publishing that were more suitable for online publishing and not locked into proprietary word processing software. Legislative drafting offices started developing websites and thinking about the long-term management of their data.

XML based systems

In the last 12 years, only four of the 10 legislative drafting offices in Australasia have implemented SGML/XML-based drafting and publishing systems: Tasmania, New South Wales, South Australia and New Zealand. These four systems each strongly reflected the state of technology at the time of their planning and development, as well as the business

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4 http://www.austlii.edu.au/austlii/

5 See Victorian *Constitution Act 1975*, section 72 (1A). http://www.dms.dpc.vic.gov.au/

6 See The EnAct System

drivers and the resources peculiar to each office concerned.

XML business drivers

The four XML-based offices each had a compelling reason or business case to migrate to this particular technology:

- Tasmania had almost zero technology in its legislative drafting office in the early 1990s and its legislation was not being updated in printed form. This led to judicial and public criticism.
- New South Wales had all of its legislative data in a clearly obsolete format (WordPerfect 5.1) and that had major limitations for online publishing (i.e. its HTML capacity).
- South Australia similarly had its legislative data in WordPerfect 5.1.
- New Zealand had the legacy of a series of unusual arrangements with commercial printers and legal publishers that restricted its operations and public access to legislation. A very clear New Zealand public policy agenda on public access and copyright was an important driver.

XML pros and cons

The main benefits associated with XML-based publishing systems are:

- Better online public access
- Streamlining of processes for both legislative drafting and publishing
- Portability, inter-usability and longevity of data
- Freedom from proprietary software.

Most of these benefits, especially for public access, online publishing and automation can be amply demonstrated in the four cases, although the costs have been high in some quarters. The freedom from proprietary software is only partly realised in most cases as the surrounding systems are highly bespoke and proprietary.

These projects have, in the main, been more complex and time consuming than expected. They have a marked tendency to be expensive. It is clear that there is only a very small pool of suitably qualified specialists available to undertake development work. There is also a need to have in-house expertise to drive and assist in the development and maintenance of these systems. Another major factor in implementing XML is the ability to control the document. In cases where the source document has to be passed around different agencies, the number and nature of the different stakeholders are likely to compound the complexity of the project. This perhaps explains why the other Australasian jurisdictions have been slow to implement similar projects, although there

are a growing number of XML-based systems in North America and elsewhere. In the meantime the non-XML offices have developed very sophisticated word processor based drafting and publishing systems (all using Microsoft Word except Queensland, which uses 'Framemaker').

2000s: consolidation of paper publishing function

The falling cost of technology, for printers, copiers and PCs, assisted in the movement of legislative drafting offices into the publishing sphere. This also made the long decline of traditional Government printing operations permanent, especially as the work of printing and distribution succumbed almost everywhere to the fashion for contracting out this function to private sector companies.[7] The practice of legislative drafting offices being responsible for publication right up to final printing from camera-ready copy is now the rule[8]

Table - Drafting and paper publication software and end stages (2009)

Jurisdiction	Production software	Final paper publication stage
Australian Capital Territory	Word, PDF	Camera-ready + bulk prints some Bills
Commonwealth	Word, PDF	Postscript file for Bills, PDF for all else
New South Wales	SGML, FrameMaker, PDF	Camera-ready + bulk prints all Bills

[7] New South Wales still has a Government Printer. The office holder is one of about 5 staff employed in the Department of Commerce who compile the NSW *Government Gazette* and manage the contracts for printing and distributing paper legislation. The sole robust Government Printer in the region is the State Law Publisher in Western Australia, which not only publishes all legislative publications but also controls and manages the WA legislation website.

[8] For a detailed comparative table on printing arrangements across the jurisdictions see page 77 of *Legislative drafting in Australia, New Zealand and Ontario: Notes on an informal survey*. Nick Horn. 2003. http://www.opc.gov.au/calc/docs/Article_Horn_informalsurvey_2005.pdf

Northern Territory	Word, PDF	Camera-ready
New Zealand	XML, Arbortext, PDF	Camera-ready
Queensland	FrameMaker, PDF	Camera-ready
South Australia	XML, XMetaL, Word, PDF	Camera-ready
Tasmania	Enact, Word, PDF	Camera-ready
Victoria	Word, PDF	Camera-ready
Western Australia	Word, PDF	Word to SLP for Bills and instruments, PDF for reprints

2000s: consolidation of online publishing

The current decade has featured the consolidation of online publishing by legislative drafting offices and the expansion of resources for that function. All Australasian jurisdictions are now providing free public online access to legislation and most of them are directly operating legislation websites (see table in Part 2).

2009 and beyond: online legislation and integration

The integration of drafting and publishing functions and the ascendancy of online access to legislation make the overall management role of legislative drafting offices more complex from an IT perspective. Making a legislation website a part of the legislative process (the ACT Register, the Commonwealth's FRLI and New South Wales Notification) adds another layer of responsibility and IT anxiety to legislative drafting offices. Records management and the tracking of documents through the external legislative process as well as the in-house drafting stages are challenging. These activities can also be linked to work measurement and the incessant requests from treasury types for "outputs", KPIs, page counts, turnaround times and the more ominous "savings dividends". With the growth of IT and related budgets there are expectations focussed on the IT function itself, with demands for security systems, benefits realisation registers, business continuity plans: something new every 12 months to distract management.

The solution for most of these integration requirements in New South Wales has been LEGIS (Legislation Information System). LEGIS is an integrated system for drafting, storing, tracking and publishing legislation. It is intended to be a cradle to the grave repository for New South Wales legislation. It contains legislation in draft, passage and

enacted form together with a comprehensive history of events. In addition to legislative documents, it is also used to store the cabinet minutes, instructions and emails associated with those documents. For management purposes, it can be used to track work through all stages, measure workloads and turnaround times. It provides assistance when balancing staff workloads and allocating new tasks to staff members. For public access purposes, the system has the capacity to generate all kinds of catalogues and tables relating to legislation.

LEGIS drives the legislation website and tracks the online publication of individual instruments. Its content is entirely searchable within the office and every document, movement and event has an audit trail.

Other jurisdictions have or are developing similar, interlocking systems for recording and reporting. The OWLS system in Western Australia comes to mind and the ACT have long had a life-cycle automation management system on the drawing board.

The spread of these types of systems seems inevitable as the software becomes more accessible and online expectations grow. They are, however, remarkably complex and the legislative drafting process rarely follows the linear and predictable path that IT developers expect. It is another world compared with the document management systems used in big business that are typically foisted on government.

Geography is destiny?

The various operating environments and political events experienced in the Australasian jurisdictions have also played a part in the development of individual offices and there are some marked differences.

Key elements in the New South Wales experience provide a vivid example of how the environment shapes development:

- Technology early adopters in the 1980s
- Closure of the GPO in 1989
- Control of the document cycle
- Development of in-house IT staff
- Waiver of copyright 1995
- PCO a separate Government department 1991-2006.

These events and circumstances provided the PCO with the opportunities, freedom and resources to develop a wholly integrated operation and develop systems and new "products". Much of this work has been done on an in-house and incremental basis.

Conclusions on the "one-stop shop" legislative drafting office

The convergence of legislative drafting and publishing brings additional pressures and responsibilities to legislative drafting offices and legislative counsel. Deadlines shrink when it becomes known that the means of production are entirely in-house and you can produce tabling copies of a Bill in less than 60 minutes. (Bulk printing of Bills is not for the faint-hearted and is understandably too industrial for most legislative drafting offices.)

The traditional legislative drafting office with a main body of legislative counsel supported by a smaller number of generalist clerical staff has become dual focussed, with establishments that are more equal in overall numbers. Drafting office management and budgets have had to expand to cater for more staff who have specialist skills in IT and publishing production, not just for producing the traditional paper documents but carrying the responsibility for online publication and complex, integrated systems.

Legislative counsel have to become increasingly multi-skilled and this poses difficulties with technophobe counsel who may have a longing for more simple times. New IT systems for legislative drafting and publishing are sometimes accused of stifling drafting creativity. Such systems all have a tendency to impose rules and standards on users. They potentially bring increasing levels of automation and consistency to the legislative drafting "output" but this has to be balanced with ease of use and general acceptance by legislative counsel. Similarly, with integrated systems, legislative counsel are frequently reluctant to embrace activities ancillary to legislative drafting that are now common in document management systems (like recording drafting effort and progress, or even minimal record keeping in some cases).

The continuing march of technology introduces time consuming and complex management issues as it brings overheads in terms of staff, contractors, technical complexity and occasionally enormous costs and setbacks. This has to be balanced against the satisfaction of controlling the life cycle of legislation and being able to provide the best possible legislative drafting services to the Government and public access to the law.

Part 2: E-legislation

Why authorise online content?

Although three legislative drafting offices in Australia have to varying degrees authorised legislative content on their websites there has been little hue or cry about the status of online content. It has not been the subject of significant discussion. The oft-mentioned angst about on-line official versions and possible mistrust by the courts appears to have no basis in fact in our corner of the globe. There is more likely to be a problem with an out-of-date paper reprint.

However, there has been a growing expectation from some users of legislation that formal authorisation be given to the source online version, especially as traditional libraries are so expensive to maintain and paper legislation is becoming less accessible. In New South Wales, law libraries have reduced in number and in some sad cases major holdings have been jettisoned completely. The local expectation and interest in authorised versions has come mainly from the law librarians. This is hardly surprising and there has been a comprehensive study of the subject in the USA by their counterparts. The American Association of Law Librarians analysed the level of authentication of online legal resources across all American States and found that although many had official sites for legislation, not one State met the exacting standard for authenticated legislative content.[9]

New South Wales legislative drafting staff have been using online content since the mid 1990s when the comprehensive collection of Acts and subordinate legislation in WordPerfect 5.1 was first developed. This source material was made available online to the public via *AustLII* and the commercial legal publishers from 1995, although the republished content was not necessarily up-to-date or rendered accurately.

The use of online source material by New South Wales legislative counsel removed the need for the PCO to keep paste-up master sets of all items of principal legislation. The online consolidated versions were accepted as correct for the purposes of amending legislation. With the launch by PCO of the official legislation website in 2001 legislative counsel were provided with a download facility to be able to directly reuse source data from the website into their documents using the new SGML-based legislative drafting and publishing system, without reformatting.

The process of maintaining the source data in SGML and its automated publication to the

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[9] *State-by-State Report on Authentication of Online Legal Resources*. Richard J Matthews and Mary Alice Baish, American Association of Law Libraries. Chicago. 2007, see pages 13, 19 and 21.The report (page 8) uses the following definitions:

> An *official* version of regulatory materials, statutes, session laws, or court opinions is one that has been governmentally mandated or approved by statute or rule. It might be produced by the government, but does not have to be.
>
> An *authentic* text is one whose content has been verified by a Government entity to be complete and unaltered when compared to the version approved or published by the content originator. Typically, an *authentic* text will bear a certificate or mark that conveys information as to its certification, the process associated with ensuring that the text is complete and unaltered when compared with that of the content originator. An *authentic* text is able to be *authenticated*, which means that the particular text in question can be validated, ensuring that it is what it claims to be.

http://www.aallnet.org/aallwash/authen_rprt/AuthenFinalReport.pdf.

website in HTML was used for 7 years before the content was formally authorised (or authenticated) in 2008.[10] By that time the reliability of the website and the confidence among users was such that authorisation passed with little fanfare or comment. The online publishing process and website were also reinforced at that time with a new underlying software system including extensive audit trails and a "confirm bot" that verifies that online publication has taken place, and new servers with greater capacity. The website is operated and funded by PCO and the servers are hosted at a secure site used by other Government agencies.

New South Wales legislation website

In terms of public access and acceptance, the website is in the top 20 New South Wales Government websites and receives an average of 400,000 hits per day or over 13,000 visitors (more than most major New South Wales Government departments). Problems and complaints are minimal. Content is updated within 3 working days and the site is replacing the traditional method of gazettal so it is effectively becoming part of the legislative process. Since early 2009, statutory instruments are notified on the site instead of the *Government Gazette* and the text of the instrument is linked. A free, weekly email service is sent to 3,500 subscribers on Fridays, listing the newly notified instruments as well as other legislative events including the passage of Bills.

In comparison, New South Wales paper legislation is becoming increasingly uncommon and expensive. There are now only approximately 200 subscribers (down from over 1,000 10 years ago) to the main paper products (Reprints of Acts). A full suite of New South Wales printed legislation costs over $10,000 per year and needs considerable librarianship and shelf space to house. The age-old problems with the currency of paper legislation are also increasing. Consolidated reprints are quickly out of date as major titles are amended so frequently and very few readers understand how to use secondary tables and guides effectively. The printing and distribution of New South Wales legislation has been outsourced for some years and has become an increasingly precarious business operation.

One challenge for New South Wales and other jurisdictions is the need to continue serving both classes of legislation user: the paper-based and the online. The major libraries and some judicial officers are still firmly wedded to B5 printed and bound versions with their traditional secondary tables and guides. This results in two sets of products being produced: one static range of paper products for an ever declining readership and another for a growing number of online users and where there is still scope for considerable development of the "product". This may take several more years

[10] http://www.legislation.New South Wales.gov.au/ See 9 February 2009 statistics from the New South Wales Board of Studies (Lyndon.Sharp@bos.New South Wales.edu.au)

to resolve.

What is authorised?

In Australasia we have 2 approaches: those that have taken the bold step of authorising the text as published online; and those that have merely authorised the in-house database of legislative content (with an obligation to make it accessible on a website).

Australian Capital Territory

The ACT was the first Australasian jurisdiction to authorise its online legislation, in September 2001, and it now authorises onscreen and downloaded versions (in PDF).[11] While the site identifies the current in force version of legislation, the downloaded PDF is not able to be internally date-stamped with the date of access to the website (the printed download is the equivalent of a paper reprint correct as at the date the consolidation was compiled). The Australian Capital Territory is the only jurisdiction using digital signatures on its documents and site authentication software (Adobe digital signatures and the VeriSign SSL certificate).

Commonwealth of Australia

Recent amendments made by the Commonwealth Evidence Amendment Act 2008 [12]

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[11] ACT Legislation Act 2001, section 24:

24 Authorised electronic versions

(1) An electronic copy of a law, republication or legislative material is an authorised version if—

(a) it is accessed at, or downloaded from, an approved web site in a format authorised by the parliamentary counsel; or

(b) it is authorised by the parliamentary counsel and is in the format in which it is authorised by the parliamentary counsel.

[12] Section 4 and 5 of the renamed *Acts Publication Act 1905*:

4 Acts database

(1) The Secretary may cause to be maintained an electronic database of:

(a) Acts as assented to; and

(b) compilations of Acts.

(2) The Secretary may, in writing, declare a database maintained under this section to be an Acts database for the purposes of this Act.

(3) The Secretary must cause steps to be taken to ensure that Acts and compilations of Acts in an Acts database are available to the public.

(Sch.3, cl 5) states that Acts on the Acts database declared by the Secretary of the Attorney-General's Department are complete and accurate records. While there is an obligation to make the database publicly accessible, the online versions are not given authoritative status. The provisions commenced on 4 December 2009.

Under the Legislative Instruments Act 2003, section 22[13], instruments are registered in the Federal Register of Legislative Instruments (FRLI) – legislative instruments have no force unless registered – and PDF versions that are marked on the site with a FRLI logo are authoritative.[14]

Tasmania

Tasmania took a similar legislative approach to the Commonwealth and authorised electronic versions of legislation on the *database* established and controlled by the Chief Parliamentary Counsel, but the relevant steps to authorise the online versions have not yet

(4) A declaration made under subsection (2):

(a) is not a legislative instrument; and

(b) must be published in the *Government Gazette*.

5 **Effect** of inclusion in an Acts database

(1) An Act in an Acts database is presumed, unless the contrary is proved, to be a complete and accurate record of the Act as assented to.

(2) A compilation of an Act in an Acts database is presumed, unless the contrary is proved, to be a complete and accurate record of the Act as amended and in force on the day specified in the compilation.

(3) In any proceedings, proof is not required about the provisions and coming into operation (in whole or in part) of an Act as it appears in an Acts database.

(4) A court or tribunal may inform itself about those matters in any way it thinks fit.

[13] Commonwealth Legislative Instruments Act 2003, section 22:

22 The status of the Register and judicial notice of legislative instruments and compilations

(1) The Register is, for all purposes, to be taken to be a complete and accurate record of all legislative instruments that are included in the Register.

(2) A compilation that is included in the Register and that relates to a particular legislative instrument is to be taken, unless the contrary is proved, to be a complete and accurate record of that legislative instrument as amended and in force at the date specified in the compilation.

[14] See the FRLI home page at http://www.frli.gov.au/

been taken.[15]

New South Wales

The New South Wales website is the official legislation site and is defined in the Interpretation Act 1987.[16] Since its launch in 2001, the content has been considered authoritative (even though it had no legislative basis) and used as the sole source of primary online legislative material (data is supplied by the PCO to secondary legal publishers such as AustLII and the commercial law publishers).

However, the step of formally recognising the website in legislation and conferring authorised status for its content was not taken until 2006 by amendments to the Interpretation Act.[17] Typically, the IT project underpinning this small step took far longer to complete than planned, and in October 2008 the Parliamentary Counsel finally certified under section 45C (5) of the *Interpretation Act 1987*[18] that the following form of

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[15] Tasmanian Legislation Publication Act 1996, section 6 (10) and (11):

> (10) The Chief Parliamentary Counsel may approve the production of copies of authorised versions of Acts or statutory rules and copies of reprints of Acts or statutory rules in electronic or printed form by a person approved in writing by the Chief Parliamentary Counsel for the purposes of production or distribution.
>
> (11) A copy of an Act or a statutory rule or the reprint of an Act or a statutory rule produced under subsection (10) is to contain a statement to the effect that the copy is produced with the approval of the Chief Parliamentary Counsel.

[16] Section 21 of the Interpretation Act 1987 , definition:

> ***New South Wales legislation website*** means the website with the URL of www.legislation.New South Wales.gov.au, or any other website, used by the Parliamentary Counsel to provide public access to the legislation of New South Wales.

[17] See NSW Interpretation Amendment Act 2006.

[18] See NSW Interpretation Act 1987, section 45C:

> **45C Publication on NSW legislation website**
>
> (1) The Parliamentary Counsel may publish on the NSW legislation website under the authority of the Government:
>
> (a) legislation (as originally made or as amended), and
>
> (b) other matter (including information relating to legislation and any matter authorised by law to be published on the website).
>
> (2) Legislation or other matter is published on the NSW legislation website:
>
> (a) if it is made accessible in full on that website, or

legislation on the website is correct:

- The 'In Force" database of current legislation (HTML format), and
- The "As Made" database of original legislation (in PDF) dated 2000 or later.

The general terms "authorised" and "certified" are used to describe the online content. Supporting documentation, including a Ministerial Memorandum, have made it clear that the online material has the same weight as the traditional paper versions.[19]

The In Force collection consists of Acts, regulations and other statutory rules, and environmental planning instruments. This collection is maintained in an up-to-date state within 3 days (although usually within one day) of any additions or amendments. It also contains historical point in time versions (in effect, nothing is removed from the site and all superseded and repealed versions are retained). This collection is in HTML and highly searchable. Titles are all hypertext linked as are regulations etc to their parent Act.

There is sufficient confidence in the process of publishing content from the legislation database to the web that the live version of the document that appears online in HTML on the user's screen is the certified version. In recognition of the fact that users will print the accessed version for later use, the online rendition is stamped with the time and date accessed by the user, and carries an authorisation statement. Accordingly, an authoritative version of legislation as at the date the website was accessed (not the earlier date when the legislation was last amended) is available to the public.

(b) if notice of its making, issue or other production is made accessible on that website and it is made accessible separately in full on that website or in any other identified location.

(3) The date on which legislation or other matter is published on the NSW legislation website is the date notified by the Parliamentary Counsel as the date of its publication (being not earlier than the date on which it was first made so accessible).

(4) If legislation or other matter cannot for technical or other reasons be published on the NSW legislation website at a particular time, the legislation or other matter may be published at that time in such other manner as the Parliamentary Counsel determines and published on that website as soon as practicable thereafter. In that case, it is taken to have been published on that website at that earlier time.

(5) The Parliamentary Counsel is to compile and maintain a database of legislation published on the NSW legislation website, and may certify the form of that legislation that is correct.

[19] See M2009-02 NSW Legislation Website: Authorisation of Online Legislation and Online Notification of New Statutory Instruments, 23 January 2009.

Table - Status of online legislation, formats and source URLs in Australasia

Jurisdiction	"Authorised"	Formats	Website URLs
Australian Capital Territory	Yes	PDF, RTF	www.legislation.act.gov.au
Commonwealth	Yes for instruments in PDF on FRLI. Acts database 4 December 2009	PDF, Word, HTML	www.comlaw.gov.au
New South Wales	Yes	HTML, PDF	www.legislation.New South Wales.gov.au
Northern Territory	No	PDF, Word	www.nt.gov.au/dcm/legislation
New Zealand	Work in progress[20]	HTML, PDF	www.legislation.govt.nz
Queensland	No	PDF	www.legislation.qld.gov.au
South Australia	No	PDF, RTF	www.legislation.sa.gov.au
Tasmania	No (but provided for)	HTML	www.thelaw.tas.gov.au
Victoria	No	PDF, Word	www.legislation.vic.gov.au
Western Australia	No	PDF, Word, HTML	www.slp.wa.gov.au/legislation

[20] See New Zealand Legislation website - About this site - current status

Websites as part of the legislative process

Three Australian jurisdictions have effectively built their websites into the legislative process. This is likely to be a trend, given the desire to have better access to legislation and in particular more comprehensive collections of all types of legislation.

Australian Capital Territory

Since 2001, the ACT legislation register has been used to notify the making of legislation, replacing the traditional *Government Gazette* .[21] The register includes a very broad range of instruments:

- authorised republications of laws currently in force
- Acts as made
- subordinate laws as made
- disallowable instruments as made
- notifiable instruments as made
- commencement notices as made
- resolutions by the ACT Legislative Assembly to disallow or amend subordinate laws or disallowable instruments
- Bills presented to the ACT Legislative Assembly
- notifications of the making of Acts, subordinate laws, disallowable instruments, notifiable instruments and commencement notices
- notifications of the disallowance or amendment of subordinate laws and disallowable instruments by the ACT Legislative Assembly.

The register also includes other material to help legislation users, for example, explanatory statements for Bills, subordinate laws and disallowable instruments and information about legislation. The size and nature of the Australian Capital Territory makes central registration a relatively manageable exercise.

Commonwealth

The *Federal Register of Legislative Instruments* was established in 2005. All statutory

[21] See "About the register: an overview" under "Information", available from http://www.legislation.act.gov.au/. (Accessed: 20 March 2009)

instruments of a legislative nature that are made on or after 1 January 2005 must be registered on the Federal Register to be enforceable. In addition, all in force statutory instruments that were made before 1 January 2005 must be registered on the Register if they are to remain in force. Sections 5 to 7 of the Legislative Instruments Act 2003 define and describe the very broad range of instruments concerned. The Legislative Instruments Act and the Register are currently subject to a wide-ranging review.[22]

New South Wales

The new Notification feature on the legislation website provides official notice of the making of statutory instruments (regulations, rules and environmental planning instruments etc) on the legislation website rather than publication in the paper *Government Gazette*.[23] The notification page has embedded links to the actual instruments, which are located in the *As Made* database on the website. This feature applied from 26 January 2009 to all environmental planning instruments and from 2 March 2009 for all statutory instruments drafted by the Parliamentary Counsel's Office and made by the Governor (mainly regulations, rules, commencement proclamations and court rules).

Notification enables instruments to be published online on a cumulative basis each week with a permanent archive facility for previous weeks and years. In association with notification, there is a weekly email service listing all instruments notified on the website and other legislation events, which is sent to subscribers on Friday afternoons. This replaced the longstanding Weekly Bulletin service and now has about 3,000 subscribers.

In this area, New South Wales has not been as bold as the Commonwealth, which required all instruments of a legislative nature to be notified. New South Wales has taken a more manageable approach of taking over firstly those instruments drafted in the PCO. The New South Wales approach is intended to enable an increasing number of miscellaneous statutory instruments to be accessed online. This will be achieved by amending the parent Acts on an individual and staged basis (to require notification on the website instead of the *Government Gazette*) rather than by defining what is a legislative instrument and creating a registration system like the Australian Capital Territory or the Commonwealth.

In addition to the *Notification* feature and the weekly email service, the New South Wales PCO has made a series of incremental improvements to the website to provide better

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22 Review of the *Legislative Instruments Act 2003* (2008-09). See http://www.ag.gov.au/lia-review A report is expected to be tabled in April 2009.

23 See http://www.legislation.New South Wales.gov.au/ and sections 44 and 45 of the *Interpretation Act 1987*.

public access to the law. These improvements are—

- Maps in zoomable PDF have been added to new environmental planning instruments - these show land use zoning, building heights etc (New South Wales is the only Australian office that drafts planning instruments);
- Explanatory notes to Bills are available in the *As Made* collection as these are frequently sought by specialist users;
- Consultation or exposure drafts of Bills are published and retained on the site because they are also hard to track over time.

In an ideal world New South Wales Bills and the associated legislative passage information would also be integrated with the website but the PCO has an informal agreement with the Parliament that the Parliament maintains the definitive website for parliamentary information and Bills and the PCO is responsible for maintaining the website for legislation for its existence after it is enacted.

One great irony remains in New South Wales: the actual legislative processes are still an all paper-driven one, with documents and processes reflecting the 19th century. Ministers sign instruments, and other documents about those instruments; parliamentarians receive their line-numbered printed bills; and liveried attendants deliver pseudo vellums to the Governor for stamping and signing. We seem light years away from e-assent and other electronic legislative processes.

What's still missing from public access?

"Ignorance of the law is no excuse, *unless there is no way of finding out what the law is*."[24]

"*Slippery instruments*": There is a somewhat slippery class of statutory instrument in many jurisdictions. In New South Wales, these instruments have been termed "miscellaneous statutory instruments" and in some other jurisdictions they are known as "deemed statutory instruments". The instruments are not generally drafted centrally by the relevant legislative drafting office but are usually prepared in Government Departments and made by Ministers. In New South Wales, they are at least published centrally in the *Government Gazette*. However, this is a static form of publication with very limited searchability and indexing. The instruments are hard to locate and even harder to establish if they have been superseded. And unlike instruments drafted and published by the PCO, they often lack formal or unique citation, which of course means

[24] Berlins, M, 2008, *A Kafkaesque excuse for ignorance of the law*, (Online). Available from http://www.guardian.co.uk/uk/2008/nov/03/law-kafka-transparency-marcel-berlins (Accessed: 18 March 2009) . Emphasis added.

that they are anonymous.

As mentioned, the PCO is developing a scheme to make these legislative instruments more accessible by bringing them into the one website and more resemble the main body of existing instruments.

The lifecycle catalogue: This catalogue is the holy grail of online access for the cognoscenti. It will resemble a definitive table of Acts and subordinate legislation that is not only hypertext linked to the text of the instrument but also yields up the life-cycle events and history. It should replace the static and often bewildering tables and supplements that have traditionally been produced by legislative drafting offices. It should also be "customisable" by the online user to slice into alphabetical or historical chunks and to include or suppress various types of metadata.

Subject indexes: This is a longstanding area of need in the online legislation sphere, even when a sophisticated search engine is available. The problem with full text keyword searching is that you can easily retrieve too much information. Often this sort of search is followed by a lot of browsing through the results list to identify the relevant items, and even then you may miss some of them.

Subject indexing ensures that there is a controlled vocabulary as opposed to a natural language vocabulary. A subject index is associated with a subject thesaurus which provides preferred terms and related terms among other things.

In the case of early 19th century New South Wales legislation, it would be useful if a subject index or at least thesaurus could be created to link the legislation to present day English as well as linking variations in terminology. Some examples from the 1820s to the 1840s that would need cross-referenced linking are:

- colonial distillation / spirits
- debtors' relief
- felons
- hulks
- lunacy / lunatics
- Masters and servants.

Like language generally, legislation reflects changes in common usage. Citations change completely in some cases. Instruments are remade with new terms and subject-matters. Fashion and lapses of commonsense have dictated some citations that are far from being intuitive or remotely useful over time. Guides in the form of online subject indexes or thesauri are rare. The New Zealand Law Commission has focussed considerable

attention on the topic of subject indexes.[25] The Victorian CPCO has for many years been the only office producing a detailed subject index in hard copy[26] and this would be invaluable as a dynamic online index with links to the actual legislation. In New South Wales, this is some way down the "to do" list and would need some special funding to provide some one-off IT development and a permanent indexer to create and keep the content up-to-date.

Historical material: There is a growing expectation that the entire statute book should be online, particularly as paper libraries are being dispersed and paper volumes deteriorate. The older material is also of special interest to historians. Several Australasian jurisdictions have active projects underway to capture this material and New South Wales plans to add the 1824-1989 statutes to its existing "*as made*" collection during 2010.[27]

Why PCOs?

The New South Wales PCO has drafted and published legislation as an integrated service since 1990 when the Government of the day closed the Government Printing Office and more or less forced its hand. The Office has a solid core of in-house editorial and IT experts, in addition to a full complement of legislative drafting staff, who can ensure the quality, integrity and currency of publications and effectively develop these. Similarly, the Office controls the entire document flow from initial draft to enactment and eventual repeal, which is not common. Even so, the general set of characteristics for integrated legislative drafting and publishing, with centralised control over the main body of legislative data is now shared by the great majority of legislative drafting offices.

Unlike many Government agencies in the current era, legislative drafting offices tend to be stable both in terms of function and resources and have the most compelling need for comprehensive and complete legislative records. They have the greatest bank of knowledge about the statute book and the necessary obsession about accuracy and detail. Accordingly, they are the logical keeper and publisher of the laws of the state.

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[26] See Office of the Chief Parliamentary Counsel, Subject Index.

[27] Victoria, Western Australia, the ACT and New Zealand have historical statutes capture projects underway.

Berlins, M. 2008, A Kafkaesque excuse for ignorance of the law (Online). Available from http://www.guardian.co.uk/uk/2008/nov/03/law-kafka-transparency-marcel-berlins. (Accessed: 18 March 2009)

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Bi-lingual Drafting in Hong Kong[1]

Tony Yen[2]

Introduction

I am very pleased to see you all in Hong Kong this morning. I am also honoured to have been asked to speak at this Conference. Hong Kong had indeed experienced both interesting and challenging times in the years that culminated in a change of sovereignty in 1997. Huge volumes of legislations contained new social concepts such as human rights law, laws on equal opportunities and privacy and data protection were enacted in the period from the late '80s to 1997. Laws that were required for a smooth transition to the new regime were also put on a top priority time table of the Chinese Central Government, the British Government and the local Hong Kong Government. The onerous burden of the drafting of all these laws fell on the shoulders of the 30 or so legislative counsel in Hong Kong. This group comprised both counsel who were locally recruited as well as counsel from other common law jurisdictions, such as England, Scotland, Ireland, Australia, New Zealand, Canada and Sri Lanka. They were a magnificent team of which luckily I was a member. I would like to take today's opportunity to express my gratitude to them for their contribution to Hong Kong's legal system.

In addition to the conventional legislative drafting work, one other major undertaking of Hong Kong's legislative counsel at that time was the production of a bilingual statute book. This was a historic and unprecedented work. Today, I would like to share with you Hong Kong's experience in bilingual legislation and how that experience affects the way we now draft our law.

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[1] This is an edited version of a paper given at the CALC conference held in Hong Kong in April 2009.

[2] Former Law Draftsman, Hong Kong

When the United Kingdom established sovereignty over Hong Kong in 1842, the English language became the official language and the predominant language of the law. As far as written laws are concerned, all legislation was drafted only in the English language. The English texts of the draft laws were then debated in the Legislative Council, passed through the legislative process and published. English language was also the only language used in court proceedings. The exclusive use of English in legislation and in court proceedings has resulted in a "linguistic apartheid" and has alienated Hong Kong's Chinese speaking local population from the legal system. In those years, Hong Kong people who were not proficient in English were also disadvantaged in their dealings and communications with the Government, since almost all governmental documents and official correspondence were done in the English language. This system resulted in the public's alienation from the law, and thus led to inequality and injustice.

With the signing in 1984 of the Joint Declaration the Governments of the United Kingdom ('the UK') and the People's Republic of China ('the PRC') on the future status of Hong Kong, there was little doubt that the Chinese language (being the official language of the PRC and the language used by the majority of the population of Hong Kong) would become at least one of the languages of the law of Hong Kong. This event triggered a flurry of legal language reforms.

Enactment of legislation to provide for bilingual laws in Hong Kong

In 1987, legislation was passed in both the UK and Hong Kong to provide that all laws of Hong Kong may be enacted in both English and Chinese. The passing of these laws laid the constitutional framework for the implementation of bilingual laws in Hong Kong.

Hong Kong's choice for producing a bilingual system is an obvious one. Both the PRC and the UK saw the advantage of maintaining the existing legal system in which the English language is entrenched. Apart from being the working tool of the legal system, the English language is also a language of international trade and commerce. If one wanted to preserve Hong Kong's position as an international commercial, financial and communication centre, the continued use of English language was necessary. On the other hand, with the prospect of Chinese sovereignty over Hong Kong, it was clear that nationalistic considerations would impinge. The fact that Hong Kong is a predominantly Chinese community was also extremely pertinent. Most people in Hong Kong are not proficient in the English language. The Chinese language is an integral part of their identity and cultural consciousness. Nationalistic and cultural reasons aside, the Chinese language's continued subordination to the English language as the language of law in Hong Kong was not seen to be in the interest of administration of justice. The decision to produce a bilingual legal system was therefore a compromise between these considerations.

In Hong Kong, the construction of a bilingual legal system started in 1987. Prior to that, all legislation was drafted and enacted in the English language only. Since then, however, all new legislation has been drafted and enacted in both Chinese and English. Also starting in that year was the program of translating all existing legislation from English into Chinese. This was a mammoth exercise involving the translation into Chinese of over 22,000 pages of legislation, much of which was drafted and enacted long time ago.

In drafting new legislation in Chinese and in translating existing legislation into Chinese, the legislative counsel and translators in Hong Kong are guided by the principles laid down in the laws. The relevant statutory provisions are contained in the Interpretation and General Clauses Ordinance which provides –

> "(1) The English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly.
>
> (2) The provisions of an Ordinance are presumed to have the same meaning in each authentic text.".

These provisions make it clear that both the Chinese and English texts of the legislation enjoy the same legal status. This also means that the legal effect of the two different languages texts should be the same. The logic underlying this is that, although there are two texts and two languages, the law is one. This has put an extremely onerous burden on Hong Kong legislative counsel and translators, for they must ensure, whether in drafting new bilingual legislation or in translating existing legislation from English into Chinese, that no one single provision of a bilingual legislation can be understood and construed in one text as having a different meaning from its meaning in the other. What they are aiming to achieve is that no court will be persuaded to give words used in one language version a meaning different from the other language version. Because of this requirement of strict legal precision, bilingual drafting and law translation are much more difficult than drafting and translation for most other purposes.

Difficulties in bilingual legislative drafting and law translation

Difficulties in bilingual legislative drafting and in law translation are many. Two main difficulties can be mentioned here. One is the lack of an equivalent Chinese expression to convey an English common law expression. Another concerns the complex sentence structure of most of the English language statutory provisions.

English legal expressions originate in the English legal system and reflect the socio-cultural context in which that legal system evolved. A legal expression does not exist in isolation. The historical evolution of English law is an interaction of the philosophical, moral, ethical, linguistic and cultural values. Many English legal expressions are historical and often archaic. It is not always possible to identity an existing Chinese expression that can accurately and fully convey the same ideas or concepts behind the English legal expression.

The lack of an equivalent Chinese expression to exactly convey the English expression has sometimes compelled a bilingual drafter and law translator to coin a new Chinese expression. These newly coined legal expressions have gradually crept into everyday usage in the local Chinese speaking community, especially among lawyers, with the result that some of them have now become accepted Chinese expressions. Thus, the difficulty of expressing English common law terms into Chinese has now been largely resolved. However, the other main difficulty, namely, the complex sentence structure of English legislation, poses an even bigger problem in the development of Hong Kong's bilingual legislation system.

Enormous differences exist between English and Chinese in grammar, syntax, style, and structure. English legal sentences, especially those written a long time ago, often have a 'run-on' structure that contains numerous commas or semi-colons, but only one full-stop. English sentences also have adjectival clauses modifying a subject and adverbial clauses modifying a verb. Either a conjunctive pronoun, such as "which" or "who" or a preposition coupled with a relative pronoun may introduce the adjectival clause. The use of conjunctions and clauses makes English sentences long and complex. Such long and complex sentences are quite commonly found in English laws, especially the older ones.

In contrast, the Chinese language has a much simpler sentence structure and is usually expressed in terse statements. The rendering of complex English sentences into Chinese requires restructuring in the Chinese language; otherwise, the sentence is either incomprehensible or unclear to the reader. As a result, legislative counsel or translators preparing the Chinese texts face a difficult task.

A notorious example of unintelligible translation is section 31 of the *Evidence Ordinance* of the laws of Hong Kong. The original English section contains 354 words, 32 commas and with only one full-stop. This structure is extremely difficult to read and understand and, therefore, extremely difficult to translate. The resultant Chinese translation version is also unintelligible. This has attracted many criticisms from readers of the Chinese texts.

Many of the problems and difficulties illustrated earlier on were brought into focus in the preparation of the Chinese texts of the laws. The difficulties are more manifest in the 22,000 pages of pre-1987 laws into Chinese than the case of drafting new bilingual laws. In translating pre-1987 laws, translators were mostly confronted with old laws that were not drafted in plain, modern style. The translators were stuck with these old laws and were not able to change them or seek to improve their language when doing the translation. On the other hand, the drafting of new bilingual laws always begins with the preparation of the English text. Based on the English text, the Chinese text is then prepared. When difficulties are encountered in preparing the Chinese text, the drafter of the English text is able to make changes to the linguistic aspects of the English text to suit the preparation of the Chinese version. It is found that if the English text of a piece of new legislation is drafted in plain language, preparation of the Chinese text is often much easier. As a result of this experience, Hong Kong's legislative counsel became aware of the need to prepare the English texts of the laws in modern, plain language.

Language re-engineering exercise

Some 15 years ago, legislative counsel in Hong Kong initiated a "language re-engineering" exercise. This was actually a gradual movement towards plain legal drafting. In drafting the English texts of new legislation, Hong Kong legislative counsel have been required to draft or write in a plainer and more modern manner. In particular, the slavish following of old fashioned precedents and the adoption of long, convoluted sentences are discouraged. Also, legislative counsel are reminded always to draft in a style that focuses on the needs of the audiences of the legislation. By audiences, I mean all members of the public who are affected by the legislation,

not just lawyers and judges.

Since embarking on this language re-engineering exercise, it has been found that the preparation of Chinese texts of the laws has been made much easier, with the result that the Chinese texts of our more recent laws are also found easier to read and understand.

It is clear that the traditional wordy, cumbrous and impersonal nature of statutory provisions and legal instruments has resulted in Hong Kong statute law being less effective. It has also hindered the construction of an effective bilingual legal system. With the language re-engineering exercise mentioned above and with the writing of Hong Kong laws in a plainer and more modern manner, those laws are now more accessible to the Hong Kong public than they were before. This helps enhance the public's awareness of their rights and obligations and thus helps to promote the rule of law in Hong Kong.

Plain language legislative drafting

While the advantages of plain legislation are now generally acknowledged, few people realise that plain language drafting is often more difficult than the traditional style of legislative drafting. Legislative counsel often have to spend extra time and effort in order to make the laws they write plain and clear enough for everyone to understand. Given Hong Kong's very busy legislative program, combined with the fact that legislative counsel are sometimes burdened with almost impossible deadlines for the completion of the drafting of legislation, plain language drafting is not always readily achievable.

This is to be regretted, but it is a political reality that sometimes has to be accepted. To overcome this problem, the Government administration and the Legislative Council have to be continually convinced of the need to allow more time for the preparation of draft legislation.

Only a decade ago, legislative debates in Hong Kong were largely conducted in the English language. Now, almost exclusively, debates in the Legislative Council are conducted in the Chinese language. The Chinese language is also used more frequently in court proceedings and among lawyers in their professional work. Many of the newly coined Chinese versions of common law expressions used in the Chinese language versions of Hong Kong laws are now in everyday use in Hong Kong. This all suggests that the common law can work in the Chinese language, and also that Hong Kong legislation can be more effective if is drafted in plain language.

Conclusion

I will conclude by saying that, with the determination and efforts of Hong Kong's administration, legislators, judges, lawyers, legal academics and legislative counsel during the years since 1987, a solid foundation of a bilingual legislative system has been laid in Hong Kong. However, the system is still relatively new and there is still room for improvement in the way Hong Kong laws are drafted and made. Continual efforts in training legislative counsel on plain language drafting and in promoting public awareness about the advantages of plain language legislation are still very necessary.

Book reviews

Bilika H. Simamba—The Legislative Process: A Handbook for Public Officials[1]

Reviewed by Lucy Marsh-Smith[2]

This book, by an experienced Commonwealth legislative counsel, is written for officials who instruct legislative counsel, in the sense of their being the target readers, though it is very much a book written for legislative counsel in that its ultimate aim is to make the legislative counsel's job more efficient and thus increase output. The epilogue states that the aim:

> …was to make a substantial contribution to the knowledge that a person instructing a drafter needs to have in order to help a drafter's work to the maximum extent possible; the objective being to help in producing a larger volume of legislation within a given time while not sacrificing quality. It is my hope that the official, regardless of the jurisdiction in which he works, will have gained a reasonably good picture of how the legislative system works in the executive wing of government in most jurisdictions of the British Commonwealth and how he is supposed to play his role effectively in it.

To write a book that is sufficiently general to cover a range of Commonwealth jurisdictions while being precise enough to inform officials of the legislative counsel's needs is a tall order. Inevitably it cannot hope to be a handbook in the sense of informing the official of the specifics of how legislation is drafted in his particular territory. Instead it gives a broad overview of the legislative process from the angle of the official through still through the legislative counsel's eyes.

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1 Published by AuthorHouse, 2009

2 Chief Legislative Drafter, Attorney General's Chambers, Isle of Man.

For a book aimed at non-legislative counsel, the work focuses quite heavily in its early pages on the increasing need for jurisdictions to have experienced legislative counsel and the challenge of retaining them. It suggests that the problem may be alleviated by making better use of the drafting resources through an improved interface between legislative counsel and instructing officials and the latter tackling their role in the legislative process more effectively. The author tells us in his preface that he believes "that in many jurisdictions the training of officials on how to prepare instructions and the dynamics of the legislative process would allow output to increase by up to 50 per cent".

Chapter 1 of the book focuses on the dearth of legislative counsel, the reasons for it, the consequences to Governments of it and the efforts at international level to tackle it through training courses, technical assistance from the Commonwealth Secretariat in the case of less developed jurisdictions, and at national level through increased pay, etc. The importance is stressed of confining the scarce resource of legislative counsel to the drafting of legislation, not diverting them into general advisory work and providing them with adequate editorial and IT support. The focus then moves to the importance of good quality instructions and in officials understanding their particular role in the process.

Chapter 2, which is by far the longest, deals with the practices and procedures governing legislation from the time it is proposed up to when it becomes law. Included within this canter through the legislative process is a section on use of external consultants and one on preparation of revised editions of legislation. Chapter 3 is correspondingly brief and covers law reform commissions. Chapter 4 is concerned with bringing legislation into force. Chapter 5 deals with the structure of legislation, its component parts. Following the brief epilogue there are a number of appendices concerned with seeking Cabinet approval for legislation, a checklist for proposing legislation, an extract from a Law Revision Act, a sample parliamentary Order Paper, sample Committee Stage Amendments and a helpful glossary of terms.

The book is well written and gives a useful general outline not only of the overall process for statute law making in a Commonwealth jurisdiction, but also insight for the administrator in how the legislative counsel sees himself and how he sees their respective roles. It can, however, be no substitute for appropriate guidance for the official as to how the process operates in his or her particular country or territory. If it nevertheless inspires legislative drafting offices who have yet to write suitable guidance for instructing officers in the legislative process generally and in the preparation of legislative drafting instructions to do so, as well to wake up to the importance of legislative counsel and instructing officers working together to understand each other's needs, Mr Simamba will have made a valuable contribution to the efficiency of Bill production in many jurisdictions. In these times of recession I commend this book to anyone in Government wishing to improve processes to enable the production of legislation with improved efficiency and cost-effectiveness.

Paul Salembier—Legal and Legislative Drafting [3]

Reviewed by Lionel Levert QC[4]

LexisNexis recently published a book entitled *Legal and Legislative Drafting*, authored by Paul Salembier. Books on legislative drafting are a rare commodity and the publication of an addition to the existing bibliography on legislative drafting is an event that should be most welcomed by the legislative drafting community. In fact, this book should be well received by the legal drafting community at large, as one of its key features is the fact that it also deals with legal drafting considerations generally, and not exclusively with matters relating to legislative drafting. The book has a number of other important features that make it a particularly interesting addition to the existing literature.

As some of you may already know, Mr. Salembier is a Canadian legislative counsel with over two decades of experience in the area of legislative drafting. He has drafted well over 1,000 bills and regulations in his career. He has also taught regulatory law, statutory interpretation and legislative drafting both in Canada and abroad. In 2004, he authored a book on regulatory law and has also published several articles on aboriginal law, regulatory law and statutory interpretation. His experience is directly reflected in the maturity with which serious drafting problems and issues are discussed and analyzed in his book, and possible solutions proposed and explained to the reader.

This new publication is remarkably well-researched and well-documented. Its sources are drawn from legislation (both primary and subordinate), jurisprudence, textbooks, articles, conference papers, originating from a multiplicity of Commonwealth countries (such as Australia, Bangladesh, Canada, India, Malaysia, New Zealand, Singapore and the U.K.), as well as from

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[3] This book, which contains 549 pages, was published by LexisNexis Canada Inc., in December 2009.

[4] Consultant, Legislative Services; Former Chief Legislative Counsel of Canada; Former President of CALC.

other countries such as Ireland and the U.S.A. Clearly, the drafting issues discussed in this book will interest, and be of great assistance to, legislative counsel and other legal drafters from all over the Commonwealth and beyond.

Another key feature of this book is the numerous and diversified examples that are provided and discussed in great detail by the author to illustrate and explain the principles, rules and suggested solutions that the author deals with.

People reading this new book will undoubtedly be well served by the author's in-depth analyses of the various drafting rules or drafting problems that are discussed. Mr. Salembier's analyses are consistently thorough and well balanced. At times, one might get the impression that the author's explanations are overly detailed, but for a reader who is looking for assistance in understanding a technical drafting rule or in resolving a difficult drafting problem, Paul Salembier's book will never be considered as providing too much information or too many analytical discussions concerning that very rule or problem. Rather, readers will welcome the wealth of information provided in the book on any given topic that happens to be troublesome for them, and will find Mr. Salembier's thorough analyses to be of great assistance in understanding the various options that are available to resolve their drafting problems. And if at some point readers suffer from information overload (after all, this book is not a novel), they can take a break and enjoy one of the cartoons that are scattered throughout the book.

Although the book contains much useful information, the information provided by Mr. Salembier tends to be a little repetitive at times. I can only assume that this is due to the author's preference, every time this appears to be a more convenient of approaching things, to repeat information that has already been discussed earlier rather than simply refer the reader to a previous section of the book where the same principles, which may of course be applicable to various sets of situations, have already been discussed.

One may not always agree with the views expressed or the conclusions reached by the author (and I hasten to say that I do share most of his views and conclusions). However, readers will find in the book the various arguments and explanations that will help them identify the best options to resolve their drafting problems.

In addition to fully discussing what I would call the standard issues and rules relating to legislative and legal drafting and statutory interpretation (e.g. composing a legislative sentence, conventions for drafting definitions, consistency of expression), the author does not hesitate to tackle more difficult matters such as deeming provisions, Henry VIII clauses, or the highly technical issues relating to the drafting of co-ordinating or conditional provisions (where two or more Bills before the legislature are amending the same provision). This is where his long experience as a legislative counsel is particularly valuable. Mr. Salembier is very comfortable in analysing and explaining difficult drafting issues, and proposing appropriate solutions.

Dedicating a full chapter to Interpretation Acts and how they can assist both legislative counsel and other and legal drafters is, in my view, another key feature of Mr. Salembier's book. Referring to various Interpretation Acts across the Commonwealth, the author underscores the

importance for drafters to make room for Interpretation Acts in their drafting toolbox. Along the way, he suggests various improvements that could be made to existing Interpretation Acts in order to make them even more relevant as drafting tools.

The book contains a number of other chapters that I find of particular interest. Two of those deal with contemporary matters, namely plain language drafting and computer-assisted drafting. In his chapter on plain language drafting (one of his longest chapters, incidentally), the author discusses at great length, and in a very enlightening and balanced way, the various positions and views held by plain language promoters, the techniques that are proposed to make the laws easier to understand, as well as the benefits and risks associated with the various approaches discussed.

As for the chapter on computer-assisted drafting, even if it is a rather brief discussion on the topic (after all, Mr. Salembier does not claim to be an IT expert), it does contain excellent basic information to assist those offices that have not yet moved to an IT environment or to a full IT environment, in making appropriate decisions in that respect.

As we all know, legislative counsel are more than mere scribes. Mr. Salembier has decided to dedicate a full chapter to one of legislative counsel's roles on which unfortunately too little, in my view, has been written in the past. This is what the author calls the logical challenge function of legislative counsel.[5] Mr. Salembier provides a good analysis of this particular role that legislative counsel cannot ignore if they are to properly translate policy decisions into effective law, but I believe more emphasis could have been put on the responsibility of legislative counsel to identify substantive policy deficiencies and to suggest appropriate alternatives, even though the lead role with respect to policy development is by no way their responsibility.

Chapter 13 of Mr. Salembier's book is dedicated to the topic of best practices. This, in my view, is another particularly useful chapter. The author has grouped together a number of useful tips that, although not all directly related to legislative drafting per se, could, if implemented, make the life of the legislative counsel much easier and could have an important impact on the quality of the documents that are drafted. In my view, this chapter could easily be expanded on in future editions to cover – or to cover more extensively – such topics as work methods, work assignment, meetings, development of a corporate knowledge base, and quality control mechanisms.

Finally, I would like to point out that the book comes with a good index, which definitely makes it easier for readers to find the information that they are looking for on any given topic dealt with in the book.

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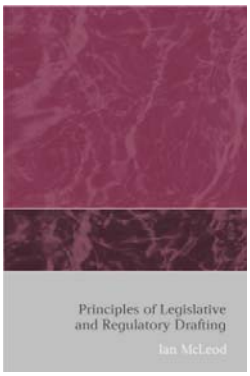
[5] My preference would have been to call that role the policy role or the policy challenge role of the legislative counsel, because the role goes beyond simply identifying logical gaps in the proposed legislative scheme.

Ian McLeod[6]—Principles of Legislative and Regulatory Drafting[7]

Reviewed by John Moloney[8]



When this reader acquires a new book, it is my habit to caress the volume and then dip in and out of the pages at random. Following the normal routine in the case of this work, I remembered an enjoyable month in London studying under, among others, Professor McLeod. My initial pleasure was confirmed and enhanced by the witty and elegant style with which the author writes. It is the distillation of his thoughts and reflection on the subject and if it provokes reflection in the reader, I suspect the author will be well satisfied. While written from the perspective of the law of England and Wales, there is much in it for those of us who follow our trade in jurisdictions with a written constitution.

Principles of Legislative and Regulatory Drafting is a short work comprising just over 200 pages and is all the better for that. One recalls the Irish exile writing to his mother "Dear Mother, I did not have time to write you a short letter, so I've written you a long one instead….". Too many legal works are marred by too much detail and laying of cases one on top of the other to build a veritable tower of confusion. Surely, quoting or referring to one good case is enough to make a point without belabouring the audience. McLeod controls references to cases with a tight rein; the references to cases are relevant and the quotations pithy and to the point.

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6 Ian McLeod is a solicitor. He is also a visiting Professor of Law at Teesside University and a Senior Associate Research Fellow in the Sir William Dale Centre for Legislative Studies in the Institute of Advanced Legal Studies.

7 Published by Hart, 2009. Copies of the book are available from the publisher at the price of £20 or €30.

8 Legislative Drafter, Department of Agriculture and Fisheries, Ireland.

The first two chapters describe legislative drafting firmly as a form of "communication" and emphasise the importance of reading legislative texts in context; all else flows from these premises. Too often, working in Government service encourages a tendency to define words separately and out of context; this type of analysis is wasteful and defeats the purpose of the legislative text, namely, to communicate the norms by which society lives. Indeed, I suspect that an excess of definition of terms is a major weakness of legislative drafting in Government Departments in Ireland. This can be illustrated by a recent experience where I examined draft Regulations that defined a "potato"; the idea of an Irishman who does not know what a potato is beggars belief. Yet, excessive use of definitions, to the detriment of communication and contextual sense, is an all too common phenomena among civil servants and, what Ian McLeod terms, regulatory drafters.

I was uncomfortable at the use of the phrase "regulatory drafting", possibly, because it could be seen as belittling my own role in drafting secondary legislation. Ian McLeod uses the term to describe the part-timer or untrained or inexperienced official who gets involved in drafting legislation as part of a range of other duties. Unfortunately, it appears to be a growing practice as the volume of legislation increases. Less than 40 per cent of statutory instruments made in Ireland are drafted by trained parliamentary counsel in the Office of Parliamentary Counsel; most other, including the majority of instruments giving effect to European Regulations are drafted by civil servants within individual Government Departments as part of their other duties. This often leads to an excessive dependence on precedent or other "authorities" and an ill conceived admixture of miscellaneous provisions that sound as if the meet immediate needs (what Jeremy Wainwright has termed "Supermarket trolley shopping"). Some of these constructions can be quite bizarre, a personal favourite being: "The provisions of these Regulations and the European Regulation shall be enforced in accordance with the provisions of these Regulations". How enlightening.

Ian McLeod's work provides an excellent primer for officials who find themselves involved in drafting as an aside or come to the task with little experience or training. The body of the text when he deals with drafting instructions, constitutional considerations, language and layout are to the point. I have carried this book about for some months now and consulted it regularly; it has provided, at least the basis of, an answer each time I have opened it. I have had the pleasure, not of discovering things for the first time, but of discovering and remembering them for myself with the assistance of this volume.

I wonder if others would, like me, turn quickly to the chapter dealing with legislative drafting instructions. It seems to be a universal factor that the quality of drafting instructions has declined and is declining. While other groups meeting socially may talk about the weather to break the ice, legislative counsel have their own pet topic and conversation will turn to the poor quality or plain crassness of drafting instructions. An experienced legislative counsel was once asked "Do drafters tell jokes?" to which the response was "No; we have instructions". Ian McLeod's chapter on the topic is a valuable introduction and when combined with such material as that emanating from the Australian Commonwealth Office of Parliamentary Counsel, the Isle of Man and,

increasingly, out of Africa, provides a large amount of relevant information for instructing Government officials.

I believe that the experienced drafter may also benefit from this work. None of us is God's gift to drafting. Under pressure, we have all settled for less than we should have. While pressure of time, political pressure and more are part and parcel of the legislative counsel's lot, we reach for perfection (even if it is unattainable). This book has acted as a valuable refresher for me; it has changed my practice in some areas. It has been a welcome resource to be used for thinking things out again – rather like a CALC conference.

If I must quibble, I would have welcomed a more comparative approach but this would have meant a larger book and perhaps defeated the purposes so well served by the current text. The emphasis on the European Convention on Human Rights is peculiarly British. While Ireland too, and for the same reasons, has a Human Rights Act, I tend to the view that it confers little of substance that is not already covered by the Irish Constitution. But these are mere quibbles and other readers may disagree.

In summary, there is much in this book not only for officials and neophyte drafters but also for those with more experience. The book will take its place beside Thornton's *Legislative Drafting* on my shelf. Thank you, Ian McLeod.

As I finish here, my copy has just been "borrowed"; I will now have to buy another.

Commonwealth Association of Legislative Counsel

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