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CALC Council

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[1] As editor, I should like to acknowledge the assistance of Dennis Murphy and Hilary Penfold in helping me to prepare this edition of the *Loophole*.

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Editorial—The presidential poll in Florida

For 36 days after the last United States presidential election, the results in Florida remained in doubt, and so did the winner of the presidency. In the end, George Bush emerged victorious when the US Supreme Court, in a 5 to 4 ruling, agreed with his lawyers' contention that the counting should end1. Since then, many supporters of Al Gore, Bush's opponent, have accused that Court of unfairly aborting a process that would have put their candidate ahead.

As a result of a recent study[2], it now seems that George Bush would still have won the crucial Florida Electoral College votes and the US presidency even if either of the two limited recounts[3] had been completed. However, if Gore had found a way to trigger a statewide recount of all disputed ballots, or if the courts had required it, the result would almost certainly have been different. An examination of uncounted ballot papers throughout Florida found enough papers where voter intent was clear to give Gore victory by the narrowest of margins. The study showed that, if the two limited recounts had not been short-circuited—the first by Florida county and state election officials and the second by the US Supreme Court—Bush would have held his lead over Gore, with margins ranging from 225 to 493 votes, depending on the standard. But the study also found that, whether dimples are counted or a more restrictive standard was used, a statewide tally showed that Gore would have won the Florida election by between 60 to 171 votes.

So what has this got to do with legislative drafting? As Jack Stark's article in this issue shows, defects in the drafting of the Florida electoral legislation caused serious problems when it came to determining the outcome of the presidential poll in that state. If, as the article suggests, reality checks had been run on the legislation when it was in draft form, some of these problems might have been avoided.

Other problems might have been avoided if the drafters of amendments to the legislation had considered the legislation as a whole with a view to avoiding inconsistencies between crucial provisions. For instance, the electoral legislation of most (if not all) Australian jurisdictions contains a provision to the effect that if the voter has not strictly complied with the directions on the ballot paper, the vote should be allowed so long as the voter's intention is clear. Had such a provision been included in the Florida statute, it might have assisted in resolving the problems that arose in that state in connection with the last US presidential election.

Another drafting issue concerned the ballot papers themselves. The form of ballot papers in many if not most common law jurisdictions is prescribed in the relevant electoral legislation and so is arguably "legislation". Because the design and content of the ballot

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1 The Florida Supreme Court would have ordered a statewide recount if the US Supreme Court had ruled the other way.

2 The study was commissioned by the *Washington Post* and other news organisations.

3 One requested by Al Gore and the other ordered by the Florida Supreme Court.

papers could be crucial to determining the outcome of an election, the drafters of the ballot papers had a responsibility to ensure that they were workable and, in particular, that voters would not be confused by them. In hindsight, it is clear that they were not workable and that voters were indeed confused by them. However, the consequences of not ensuring that they were workable and foolproof were also foreseeable. The failure to ensure that there was a tried and tested design for the whole state was itself likely to result in voters being confused. Instead, each county had its own design of ballot paper. In some counties, Palm Beach for example, a new design of voting paper was introduced for the election. Simple usability tests would have helped identify potential problems that many voters in Palm Beach encountered with the new design. Small-scale usability testing does not have to be expensive to be effective. As the presidential election in Florida showed, failing to test is liable not only to create a serious public relations problem, but also to result in vastly greater expense being incurred than would have been the case if the ballot papers had been tested.

A Note

The December 1997 issue of The Loophole included an article by Professor Joseph Kimble about clarity and precision in legislative drafting. The article (from which the last line was missing) was an excerpt from a longer article in The Scribes Journal of Legal Writing. If you would like a copy of the full article, please contact Professor Kimble at kimblej@cooley.edu

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Call for papers

The 13th Commonwealth Law Conference will be held in Melbourne, Australia, in April 2003. A CALC conference and meeting will be held in conjunction with that conference. If you would like to give a paper at the CALC conference, please tell the CALC President, Hilary Penfold, or me as soon as you can. The relevant e-mail addresses are hilary.penfold@opc.gov.au and duncan_berry@ag.irlgov.ie [Ed.]

CALC ties

Don't forget that CALC ties are available from David Morris, Law Drafting Division, Department of Justice, Queensway Government Offices, 66 Queensway, Hong Kong. The ties retail at £8.00 stg or HK$90. The ties are blue with gold diagonal stripes interspersed with gold "loopholes". One version contains the letters "CALC" also in gold. The other version is without lettering.

Lessons for statutory drafters from the Florida election dispute

Jack Stark[1]

The background

As the world knows, the 2000 United States presidential election was extremely close and ultimately depended on the results in Florida. Because those results were disputed, it was necessary for a court to determine whether the votes that election officials identified by hand recounting certain ballots ought to be included in the vote tabulation. The Florida Supreme Court ruled[2] that those ballots must be included if they were reported by a date that the court specified. The United States Supreme Court[3] granted a writ of certiorari to review that ruling. The Florida court's decision rested on its construction of several Florida statutes. Thus, certain statutory drafters experienced their ultimate nightmare: the outcome of momentous litigation depended significantly on the wording of statutes they had drafted. Although that outcome must be excruciatingly painful for them, certain techniques used or eschewed in drafting those statutes provide useful lessons for all statutory drafters.

Need for adequate staffing

Unlike the other salient lessons that one can learn from this episode, the first one is not a matter of drafting technique. Moreover, it relates to a matter that is beyond the control of drafters, although they can attempt to influence it. That lesson is that drafting agencies must be adequately staffed. No one can rationally expect them adequately to do their difficult, painstaking work if they are understaffed and thus frequently unable to devote enough time to the drafts that they must produce. As this incident demonstrates, the financial, political and public relations costs of understaffing drafting agencies may often be far greater than the money that is saved by so doing. In November 1999, three Florida drafters told me that their agencies are so woefully understaffed that their workload frequently overwhelms them. It is no wonder that some Florida statutes are difficult to interpret or produced results different from those that were contemplated. Because of the conditions under which they work, as well as because of my first-hand knowledge of the difficulty of statutory drafting, I do not blame any Florida drafters for statutes that could have been drafted more expertly. Rather, I hope to draw on the extraordinary situation in Florida and on some of the statutes that are pertinent to it to aid all statutory drafters.

The crux of the case before the Florida Supreme Court

The crux of the case before the Florida Supreme Court was the meaning of three Florida statutes and their interaction. The interactions among those statutes became an issue because interpreting each of the three statutes separately made it obvious that they conflicted and meant that the court was required to harmonise them. The first and second statutes, among other things, direct county canvassing boards (the bodies responsible for counting ballots) to send the

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1 Formerly Assistant Chief Counsel, Legislative Reference Bureau, State of Wisconsin, USA.

2 *Palm Beach County Canvassing Board v. Harris*, SC00-2346, SCOO-2348 & SCOO-2349 (2000).

3 *Bush v. Palm Beach County Canvassing Board*.

results of the election in their county to the Florida Department of State. The final sentence of section 102.111 (1) reads:

> If the Department of State does not receive the county returns by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

The final sentence of section 102.112 (1), which was enacted later, reads:

> If the returns are not received by the [D]epartment [of State] by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

A further section, 102.166 (4)(a), grants the right to protest an election, which, on a proper request, occurs before the final certification of the election's results. Part of section 102.166 (4)(c) reads:

> …the county canvassing board may authorise a manual recount.

The first thing to note is that each enactment is clear. The only improvement that I would make is substituting "the Department of State may not include the results of any county that misses the deadline" for "all missing counties shall be ignored" in section 102.111 (1). However, these enactments make it obvious that clarity does not suffice and that legislative drafters need to achieve accuracy: to write statutes that will effect the desired results.[4] One can see immediately the conflict between sections 102.111 (1) and 102.112 (1) on the issue of whether the Department of State is required, or merely authorized, to exclude from its final tabulation the results of counties that miss the deadline. Hence, one of the two enactments, although perfectly clear, is inaccurate. The conflict between whichever of the two enactments controls and the statute on manual recounts is not immediately obvious but appears after minimal examination. Sections 102.111 (1) and 102.112 (1) specify deadlines for reporting results. Section 102.166 (4)(c) authorises hand recounts, and neither that enactment nor any other enactment specifies a deadline for submitting the results of those recounts. The conflict arises because, particularly in regard to populous counties, the hand recounts cannot be completed before the deadline for submitting their results. Strict adherence to the deadline in either section 102.111 (1) or 102.112 (1) would, in regard at least to populous counties, negate the right to a hand recount. That is, despite the clarity of all three enactments, at least one of the three enactments is inaccurate in regard to deadlines and thus is unsatisfactory.

One thing that, in general, would have prevented the trouble that these enactments create and, in particular, would have made all of them accurate is a recognition that a jurisdiction's statutes are a system of laws and that within that system are smaller and yet smaller systems. That is, within a jurisdiction's statutes are a myriad of sets of statutes that relate to one another. In fact, a jurisdiction's statutes are like a set of Chinese boxes. Sections 102.111 (1) and 102.112 (1) obviously are part of a system. They deal with virtually the same subject matter: specifically, namely:

- the deadline for submitting returns, and
- the appropriate response of the Department of State to results that are submitted after that deadline.

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[4] For a more extensive treatment of accuracy and clarity, see Jack Stark, Should the Main Goal of Statutory Drafting Be Accuracy or Clarity? 15 Stat. LR 207.

When adding a new statute, the drafter must also fit it into the relevant systems. That requires not only drafting the new statute to fit well into all the systems of which it will be a part but also making the changes to the other statutes that are part of the system that are needed to maintain the system's coherence. The two-step process is like buying a sofa. First one chooses a sofa that seems suitable for the room in which it is to be placed. Second, after one places the sofa in the room for which it was intended, one might need to move some lamps and tables and to remove a chair the colour of which clashes with the sofa's colour. In the drafting of section 102.112 the second necessary phase of the operation was not performed; the relation between that section and section 102.111 was not made clear. Most likely, section 102.111 was intended to be superseded and thus should have been repealed. That section is like a chair that ought to be removed because its colour clashes with the new sofa's colour.

Those two sections are also part of a larger statutory system that is about the procedures that are to be followed after the votes are tabulated for the first time and before the state's electors are designated. That larger system includes the statutory unit on hand counting ballots. It is more difficult to conceive of that larger system and to identify its parts. Thus, it was more difficult for a drafter to notice the relation between, on the one hand, either section 102.111 (1) or 102.112 (1) and, on the other hand, section 102.166 (4)(c). Nevertheless, when the most recent of the three statutory provisions was drafted, that system ought to have been adjusted in order to avoid making it incoherent and thus to avoid requiring a court to find a way to harmonise its components.

The need for drafters to carry out "reality checks"

Performing another necessary function, doing a "reality check", would have made it easier for a drafter to identify, understand and adjust the system about the procedures that follow the first tabulation of votes. That is, the drafter ought to have resisted the temptation to think that he or she was drafting abstract principles and to have considered the ways in which the statutes that were being drafted would be administered and would affect the actual behaviour of the persons to whom they pertained. It is easy to sit at a desk and write statutes that are internally consistent and make sense on their faces. It is difficult to imagine the ways in which those statutes would forbid, authorise or require behaviour in actual cases. Drafters need to remember that statutes should not be separated from the context in which they are intended to operate.

If the drafter had looked either at the statutes that require certification of results or at the statute that allows hand recounts and thought about their consequences for human behaviour, he or she ought to have recognised that the interaction of those statutes would lead to difficulty, that it would do so because those statutes are part of the same system and that the system needed to be adjusted and was not adjusted. A drafter who thinks that he or she is writing a statute that authorises a hand recount in the abstract, in a never-never land of statutes that is hermetically sealed from the real world, is unlikely to notice that the statute will cause practical difficulties. However, in this instance, imagining the things that might actually happen would have led the drafter to realise that trouble would occur unless the statutory system were adjusted.

Specifically, section 102.166 (4)(b) allows a request for a hand recount to be made at any time before the initial results are certified. If that request is made one day before certification, the

hand recount must be completed in one day or its results will not be included in the final tabulation of votes. In a county where hundreds of thousands of votes were cast, completing the hand recount in one day is absolutely impossible. Thus, in that case, if the deadline for the final certification is firm, the right to a hand recount is nullified by the practical reality that it cannot be completed in time for its results to affect the final tabulation. In fact, hand recounts were requested in counties where hundreds of thousands of votes were cast. One such county barely missed the deadline, which caused the results of the hand recount to be ignored, and another stopped its hand recount, asserting that it did not have time to complete it before the deadline.

That state of affairs should have been predictable, and the statutory system that concerns procedures after the first tabulation should have been adjusted. Among the options were—

- requiring a request for a manual recount to be made well before the deadline for certification, and,
- (the better alternative) altering the deadline for submitting results for the final tabulation so as to allow the results of hand recounts to be included in the final tabulation.

The second alternative makes more sense than does the first because it better preserves the rights of persons who request hand recounts and because absentee ballots that are mailed from outside the United States are included in the final tabulation[5] even if they arrive after the deadline for receiving results that are to be included in the final tabulation. The court in *Palm Beach Canvassing Board v. Harris* chose the second alternative, which in turn required it to recognise that the deadline for naming electors, which appears in a United States statute[6], thereby became relevant. The court solved the problem by creating a date for the hand recount results to be submitted. In short, the court, by recognising statutory systems and performing a reality check, harmonised statutes that needed those operations because their drafters had not performed them.

Reasons why it is difficult to perform "reality checks"

One reason why Florida drafters have difficulty recognising and adjusting systems and performing reality checks is that they have only minimally used one of the few attributes of statutes that facilitates drafting them. Statutory drafting is exceedingly difficult, and many attributes of that enterprise and of statutes themselves contribute to that difficulty. Some examples are the existence of systems and the need to perform a reality check, both of which have been mentioned. Other examples are the work's highly conventional nature and the effect of other laws on the process. In the United States, some of those other laws are state constitutions and the United States Constitution. However, statutes are written in outline form; they consist of statutory units nestled inside other units. Properly and extensively used, this structure facilitates thought by drafters, including thought that results in finding parts of a system and in recognising the relation of a statute to human behaviour. Thought is further facilitated if each statutory unit has a title that reminds drafters, as well as others, of its contents.

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[5] Despite the absence of statutory authority to do that, which is another problem that ought to have been anticipated and remedied.

[6] 3 USC 7.

A close look at the Florida election code reveals that its drafters have created only a minimal outline. That code consists of eleven chapters. Two of them, as their titles immediately reveal, consist of disparate material that ought to have been separated into other chapters. One is "Candidates, Campaign Expenses, and Contesting Elections," and the other is "Presidential Electors; Political Parties; Executive Committees and Members." The order of the chapters is also somewhat random. Examining the chapter that contains the three statutes that were at issue in Palm Beach County Canvassing Board v. Harris also reveals that Florida drafters made only minimal use of the outline technique. That chapter includes twenty-one sections, and there are no subchapters or other statutory units of a magnitude that is between that of the chapter and that of the sections. That chapter could have been made easier for drafters to work on if it had been divided into subchapters. Among those subchapters could be "Election Officials," "Voting Procedures," "County Canvassing Committees," "Protests of Elections", "Contests of Elections" and "Remedies". The use of statutory units that are smaller than chapters is also flawed. That is, their arrangement and grouping do not definitely indicate their relations to one another. A good example occurs in section 102.166, which includes the material on manual recounts that was at issue in Palm Beach Canvassing Board v. Harris. That section was constructed and broken down into yet smaller units in a haphazard manner. The last of those units illustrates this:

> (10) The Department of State shall respond to the county canvassing board within 3 working days.

That unit does not specify the instances to which that deadline pertains. If it were properly fitted into an outline, its applicability would have been obvious to the drafter, who would probably have stated it explicitly.

Another reason for the drafting errors that this very important litigation made obvious is unjustified confidence in using analogous statutes as models. Properly done, recourse to an analogy both saves time and facilitates the drafting of an accurate statute. For example, drafting a Bill that creates a gross receipts tax on businesses at first glance seems to be a daunting task. However, if a drafter realises that a gross receipts tax is an income tax without deductions from income, the drafter has an analogy that he or she can use to write the Bill. Then the task will seem considerably less daunting. However, finding an analogy that appears to be useful can cause a drafter to develop a false sense of security and thus to fail to perform certain mental operations that need to be, and under other circumstances probably would have been, performed.

The analogy that was used to create section 102.112 no doubt was section 102.111. Some of the details in those two statutes are different, but some of the phrasing is identical or nearly identical. The drafter of the more recent statute probably began with the earlier one and modified it in accordance with his or her instructions. Once that was done, the job probably seemed to be over. The drafter did not even consider adjusting the new statute's system or performing a reality check. If performing those tasks had been considered, he or she would have performed them. In fact, the drafter seems to have been so confident that the older statute was a perfect model for the newer one that the drafter did not realise that it was such a perfect model because it covered the same material, with the fatal difference that a "may" had been

substituted for a "shall." In other words, the new statute dealt with the same subject matter as the old one, so that the old one ought to have been repealed because it was superseded.

The analogy that was used for the statutes that created the right to ask for a manual recount was no doubt the language earlier in the same section that created the general right to protest the election. Section 102.166 (1) reads:

> Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest.

On the other hand, section 102.166 (4)(a) reads:

> Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

The difficulty caused by using that analogy is that the procedures that are employed for the general protest are examining the tabulation if paper ballots were used, examining the counters or the "printer-pac" if voting machines were used and examining precinct records and election returns if electronic or electromechanical equipment were used. None of those procedures is time consuming, so the deadline for submitting results is not a problem even if the protest is filed late. Again, reliance on a good analogy seems to have truncated the drafter's thought process. Different procedures are followed if a hand recount is done, but the drafter seems to have been lulled into thinking that, after the procedures for requesting a hand recount were specified, all that remained to be done was to substitute the requested procedures relating to performing the recount for the procedures that pertain to conducting general protests. In any event, adding a deadline for submitting results does not seem to have occurred to the drafter and, thus, neither did the fact that there would inevitably be a time problem under some circumstances.

Conclusion

In short, an unfortunate series of faulty drafting practices, errors of both omission and commission, occurred. Some of them occurred before the drafter began work on any of the relevant statutory provisions. Those are conventions that Florida's drafters have adopted and that make their job more difficult. Other faulty practices occurred during the drafting of sections 102.112 (1) and 102.166-(4) (c). Rather than flagellating Florida's drafters for errors like those that all drafters make, drafters ought to learn from the unfortunate experience of their Florida colleagues. At the same time they should hope that none of their statutes are relevant to litigation that will decide anything as important as who will be the next President of the United States.

The commencement conundrum: How the Fiji Islands banking system was brought to a standstill[1]

John F. Wilson[2]

Introduction

It is not often that a legislative counsel single-handedly brings the banking system of a country to a standstill by giving advice on a legislative matter. But that is in effect what happened in the Fiji Islands recently when the question arose of whether a Minister had power to defer the commencement date of an Act of Parliament after the date had been appointed.

The Act of Parliament in question is the *Consumer Credit Act 1999* (No. 15 of 1999), which received the President's assent and was published in the Government Gazette on 19 March 1999. The banking standstill was in respect of lending for consumer purposes.

Background

Under the Fiji Islands Interpretation Act, a statute comes into force on the date it is published in the Government Gazette, unless some other date is appointed by or under the Act. Acts of Parliament in the Fiji Islands, following the UK practice, frequently provide for the date of commencement to be a date appointed by the Minister by notice in the Gazette.

Opinions differ over whether it is appropriate for a Parliament to empower a Minister to appoint a commencement date, rather than setting one itself. The practice in Australia[3] and New Zealand tends to be that Parliament sets the date in the Act. If the Minister is given power to set the commencement date, the Act will specify a time limit for commencement. This ensures that the Minister does not, by exercise of the executive power, frustrate the intention of Parliament in enacting a Bill. This approach assumes, not unreasonably, that if the Government brings a Bill to Parliament, it is because it wants the law enacted within a certain time.

The other approach, to be found in UK statutes and those of several other Commonwealth jurisdictions, is to allow the Secretary of State or Minister to appoint the commencement date, without any limit being stated. The rationale for this is that the Government may need time in which to put into place the necessary administrative machinery needed to implement an Act; people affected by the Act may also need time to bring their affairs into line with it. This approach accepts that not all the details can be put in place before a Bill is passed, and that the public may need educating in the effects of a new and complex statute. There is also the question of whether budgetary provision has been made for implementing a major new piece of legislation.

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1 This paper was prepared for the CALC Meeting, Petalang Jaya, Malaysia, September 1999.

2 Legal Draftsman, Grenada (West Indies); Former First Parliamentary Counsel, Fiji Islands.

3 At the federal level at least.

Both approaches have merits and demerits, and it is not the purpose of this paper to debate them at length (although any discussion generated by it will be welcome.) What I do want to do is illustrate the dangers of giving a Minister power to appoint the commencement date, if insufficient thought is given to the implications of the date once the Act has been assented to.

The Act

The Consumer Credit Act is a complicated statute, based on a Queensland precedent. It requires all providers of consumer credit[4] to provide certain information and use certain documentation. The Bill took several months to pass through both Houses of Parliament, and a sector standing committee, during which time various representations were made to the Minister about the commencement of the Bill. The consumer groups wanted it brought in as soon as possible, while the retail stores wanted it delayed as long as possible.

At the same time, the clock was ticking for the life of the Government, as general elections were due to be held in the week beginning 10 May. It was becoming increasingly apparent that the Government might not survive the elections. The Minister of Commerce therefore decided to bring the Consumer Credit Act into operation before going out of office, and I was instructed to draft the commencement notice. The Act came into force on 7 May 1999. The elections the following week produced a change of Government, and a new Minister of Commerce was duly sworn in on 19 May. By 27 May, the banks had presented a joint submission to the new Minister asking that the commencement of the Act should be deferred on the grounds that they would be unable to comply with its provisions for at least 2 years.

Political views

It could be argued that the former Minister of Commerce should not have exercised the power to bring a major statute into force in the dying days of the old administration. Some people would say that the Government was in a "caretaker" mode at that time, although that phrase more correctly applies to the position after an election and before a new Government is formed. The convention in the Fiji Islands—reinforced by agreement of the then parliamentary parties in the Korolevu Declaration in March 1999—is that the Government is in "caretaker" mode once the writs for a general election have gone out. At all events, there is an argument for saying that a Minister should not tie his successor's hands by bringing a major Act into force in the last week of his term of office.

The contrary view is that Parliament had already passed the Act and it was entirely up to the Minister when it should commence. To delay the commencement unnecessarily would defeat the intentions of Parliament in passing the Act and therefore be undemocratic. To be fair to the Minister, I should say there was no suggestion that the Bill was unpopular with the incoming administration. Indeed, it could hardly be so, as the new Government was comprised mostly of members of the Fiji Labour Party!

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[4] I.e. credit for personal and household purposes as distinct from commercial or business purposes.

The reality is, no doubt, that the former Minister wished to ensure that his term of office would be marked by at least one significant item on the statute book; perhaps also he did not wish to see all the work put into the Bill go for nothing. As the drafter of the Bill I suppose I should be grateful to him for that!

Legislative counsel's position

In drafting the commencement notice, I did not feel it was my duty to ascertain the motives for the Minister wishing to bring it into force. I knew the Bill had been delayed several months already and that there had been extensive consultations with and presentations from the interested parties[5]. I was told as long ago as August 1998 that the Bill was very urgent[6]. Why should I suspect that there would be any problem about bringing it into force? The Ministry of Commerce had its own legal adviser and no one would thank me for causing delay[7]. However, when the banks urged on the new Minister the need to defer the commencement of the Act, I felt I needed to take a stand for principle. I pointed out that the date for the commencement of the Act had passed, so that members of the public were now entitled to organise their affairs on the basis that it was law. Any consumer credit contract that did not comply with the Act was now unenforceable, and to alter that position by amending the commencement notice would deprive people of a right they had acquired[8].

I further pointed out that even if the commencement date had been appointed but had not yet arrived, the Minister could not alter it, as appointing a commencement date is an administrative and not a legislative act, so that the provisions in the Interpretation Act relating to amendment of legislative instruments do not apply. Having appointed a date, I argued, the Minister is *functus officio* and his powers are spent; they cannot be used again to amend the date.

As a practical solution, I suggested that, as enforcement of the Act was a matter for the Director of Fair Trading, who came under the general direction of the Minister, the Government could give an assurance to the banks that they would not be prosecuted for breaches of the Act if they could produce an acceptable timetable for compliance with its provisions.

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5 These days they are always called 'stakeholders', as if everything were a gambling party, and it is supposed to take place on a 'level playing field'!

6 Aren't they all?

7 I should explain that in a small country like the Fiji Islands, it is normal for legislative counsel to advise on such matters.

8 I.e. to treat certain contracts as not binding on them.

The position of the banks

The banks rejected my proposed solution, arguing that it would amount to the Minister seeking to legislate by executive fiat, contrary to the principle stated in the New Zealand case of *Fitzgerald v. Muldoon* (1976 NZLR vol. II, 615)[9].

The banks accepted, with reluctance, the view that a commencement notice could not be amended once made, but proposed instead an Act of Parliament to vacate the commencement date and appoint a new date or series of dates. So far as I was concerned, this was an acceptable solution, and I still think it would have been the best one. It is interesting to note that subsequently, the new Government decided to defer the commencement of the *Public Finance Management Act 1999*, which introduced a new system of public finance accounting which they are not happy with. Deferral of that Act, which set out the commencement dates, will be achieved by the *Public Finance (Deferral and Amendment) Bill 1999* which was about to go to the Senate when I left for this Conference.

The Government's position

In the case of the Consumer Credit Act, the new Government was reluctant to agree to introduce a Bill to defer the commencement date. This was probably partly due to annoyance with the banks for having waited until the last minute to make their representations. As I have said, the Bill was widely circulated and discussed for several months, and although the retail stores made submissions, the banks were strangely silent.

It was only after the new Government came into power that the banks spoke up, claiming the Act was unworkable. There was a strong suspicion that the banks were trying to take advantage of an inexperienced Government and to get more concessions than they needed.

Another factor was that the Government very early on announced that it would be asking the banks to reduce interest rates, for housing initially, and for other purposes in due course. It could well be that the banks saw the problem over the Consumer Credit Act as a good bargaining counter in their dealings with the Government on the issue of interest rates. At all events, a stalemate developed, with the banks insisting that they needed an Act to defer the commencement date, and the Minister saying he would not give them one.[10]

The standstill

At this point (28 May 1999), the banks suspended all lending for consumer purposes. They said they could not safely lend on contracts that did not comply with the new Act as they might be unenforceable; and that it would take the banks 2 years to become compliant with

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[9] That was a case in which Robert Muldoon announced as incoming Prime Minister that a superannuation scheme enacted under his predecessor would not be implemented. The court held that the announcement was unlawful, as it anticipated legislation that had not yet been enacted. This, the court found, amounted to usurpation of the role of Parliament 'by regall (*sic*) authority', contrary to the *Bill of Rights, 1688*.

[10] I had prepared a Bill to deal with the situation and am willing to show it to anyone who would like to see it.

the Act. People found themselves unable to borrow from the banks for any domestic purpose. Soldiers about to depart for Lebanon found they were unable to get advances for their personal needs.

The Government made some half-hearted attempts to find other sources of consumer credit, such as encouraging the Fiji Development Bank to provide it. The Housing Authority stepped into the breach by expanding its lending for personal purposes. One retailer claimed it was the only store to be fully compliant with the new Act.[11]

The banks lost a great deal of money in personal loans. They took out full-page advertisements in the newspapers explaining why they had ceased consumer lending (but not explaining why it had taken them so long to wake up to the problem.) It was quite a dramatic time; probably a rather difficult time for those needing personal credit; an expensive time for the banks. And it all came about because I advised the Minister that he should not defer the commencement of the Consumer Credit Act by amending the previous Minister's notice!

The solution

The solution finally arrived at was for the Minister to exercise his powers under section 7(12) of the Consumer Credit Act, to grant an exemption from the operation of some provisions of the Act. The exempting power was very wide, and read literally would empower the Minister to exempt all credit providers in respect of all classes of credit contract for an unlimited period. I advised that it would be unwise to read it literally and that some limitations should be built into the regulations. In fact, the *Consumer Credit (Exemption) Regulations 1999* were made and were published in an Extraordinary Gazette Supplement on 24 June, a Thursday. The banks resumed lending for consumer purposes on the same day, after a break of 4 weeks, during which they claimed to have lost several million dollars of business.

The Regulations exempted the provision of credit[12] by any credit provider in the Fiji Islands from the provisions of the Act specified in the Schedule up to the dates respectively specified. The earliest date specified was 1 March 1999 and the latest 1 July 2000. So in the end the banks were only given a 12-months deferral, not the 24 months they had asked for. Oddly enough, they found they were able to become compliant in that time.

The banks were still not covered for the period of 2 weeks from the date the Act came into force to the date the banks stopped lending. During that period consumer credit contracts were still caught by the Act and were unenforceable if they did not comply. In theory, a borrower could still seek to renege on a contract entered into in that period, which is why the banks had pressed for an Act of Parliament. But so far, no borrower seems to have wanted to take advantage of the loophole.

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[11] A difficult feat, as the implementing regulations have even now not been published in the Government Gazette.

[12] I.e. credit to which the Act applies.

Epilogue

This should be the end of the saga, but there is a postscript. The Consumer Credit Act requires regulations to be made under it in order to be fully effective[13]. No such regulations had been made by the original date of commencement, i.e. 7 May, so in fact the Government had its own reason for agreeing to the commencement date being deferred in some way. It was intended that the relevant regulations would be in place by the first effective date[14,] but that did not happen. Instructions to draft the regulations for those parts, and for the parts that came into effect on 1 September 1999, arrived on my desk just before I left for the 1999 Commonwealth Law Conference[15.]

Should I have refused to draft the original commencement notice, given that the implementing regulations had not been made? I leave you to judge. The one thing I am determined to do in future is, if possible, to avoid giving the Minister the power to appoint the commencement date for an Act. However, other solutions may also prove problematical.

I recently included a commencement date of 15 October 1999 in a Bill to provide for Nurse Practitioners, having been told that the Act must be in force by the time the students graduated in mid-October. That date is the one on which in the normal way the Act would be published in the Government Gazette after the Bill had passed the Senate and received the President's assent. The Senate was due to meet in the week following the September meeting of the House of Representatives. Then, at the end of August, Cabinet decided to defer the September meeting for 2 weeks! Had the Bill gone to that meeting, the date I had provided for would not have worked, since the Senate would not have passed it until the end of October. In the event, the Bill was passed at the meeting of the House of Representatives held in August 1999 and was dealt with by the Senate shortly afterwards, so all was well. But beware of putting specific dates for the commencement of Acts!

If you are interested in this topic, I can tell you about the *Copyright Act 1999* and the problems we encountered in bringing that into force against the wishes of the video library lobby. I could also tell you about the *Foreign Investment Act 1998* and the problems that arose from existing businesses becoming foreign on the commencement of that Act[16]. In both cases, the solution would have been to defer the operation of parts of the regulations that implemented the Act.

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13 The regulations were to provide for the contents of certain documents etc.

14 I.e. 1 July.

15 Which was held in Petalang Jaya, Malaysia.

16 Which at the time when this article was written had yet to happen.

But perhaps I have already said enough about the commencement conundrum to show that one of the shortest documents a legislative counsel ever has to draft can be one of the most problematical of all.

The legislation process course run by the Australian Commonwealth Office of Parliamentary Counsel

Iain McMillan and Camilla Webster[1]

Overview

This paper is about a course run in the Australian Commonwealth Office of Parliamentary Counsel (the "OPC") called the "Legislation Process Course". This is a course that the OPC has been running several times each year since 1994. In the paper, we cover—

- the context in which the course is run;
- the purpose of the course;
- the development and maintenance of the course;
- the contents of the course;
- the presentation of the course;
- feedback on the course;
- the benefits of the course;
- our future plans.

The context in which the course is run

Who we are and how we work with instructors

The OPC drafts all the Federal Government's primary legislation. It does not draft subordinate legislation. We draft on instructions from staff in the different Government departments. The level of instructing expertise in these departments varies greatly. Some departments have specialist legislation areas that instruct the OPC on a regular basis, and whose staff are experienced instructors. Other departments' instructors come from policy areas, and often have little or no previous experience in instructing the OPC or in the legislation process generally.

The OPC has about 25 drafters and 20 support staff. It has a conference room that can be used as a training room (for about 16 people) and also has access to a range of training tools.

The original impetus for the course

We suspect it is, and has long been, a common complaint of drafters that instructors do not understand what we need from them and what the respective roles and responsibilities of drafters and instructors are. Each time a new person instructs it seems to fall to the drafters to lead that person through the process. This is often a time consuming and frustrating process.

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[1] Commonwealth Office of Parliamentary Counsel, Canberra, Australia.

Before first starting to run these courses, the OPC had occasionally run training sessions for instructors and potential instructors within particular departments. For example, training sessions were run for the Australian Taxation Office a number of times. Then, in 1993, a parliamentary committee inquiry inquiring into legislative drafting in Australia recommended that:

> Drafting and instructing agencies should co-operate to develop more, regular training programs for officers who will be giving instructions to drafters.

The Committee's recommendation provided the impetus for the OPC to develop and run training sessions for instructors on a regular basis, rather than on the more limited basis that had occurred previously.

The purpose of the course

What the course is intended to achieve

The course is a one day introduction to the process of developing primary legislation (Acts). It is designed for people who would like to gain a basic understanding, or to refresh their knowledge, of the process involved in developing primary legislation.

At the end of a course, we hope that the participants will have a better understanding of how to—

- contribute to the planning and conduct of legislative projects within their own departments; and
- devise policy options which are more readily translated into legislative form, and which are less likely to attract criticism in the parliament, particularly in the Australian Senate, which sees itself as a house of review and which the Government rarely controls; and
- provide drafting instructions; and
- make a contribution to the processes of revising and finalising draft Bills prepared by the OPC.

The target audiences

Our target audiences are—

- officers who prepare or may prepare drafting instructions; and
- officers working in legislation or legal areas; and
- officers who may need to comment on draft legislation.

The course is aimed at a level that is appropriate for officers who have little or no previous experience in these matters, and this is emphasised in the material we send out advertising the course. Previous comments on the course have indicated that more experienced officers find the content of the course too basic.

Development and maintenance of the course

The course was developed within the OPC. It took one drafter (who had some training qualifications) a number of weeks to prepare a first draft of the course materials in consultation with First Parliamentary Counsel and other staff. Two other drafters then revised those materials for presentation at the first course in March 1994. In total, a significant amount of drafters' time was devoted to the development of the course.

The course materials are updated on a reasonably regular basis (election periods provide a useful opportunity). The updating is generally not very time consuming. The only external input into the course has been from the Department of the Prime Minister and Cabinet in relation to the sessions on the parliamentary process. These sessions used to be presented by officers from that department (at this time, the course lasted for one and a half days) but are now presented by drafters from the OPC as part of the standard 1-day course.

The course contents are generally standard across all the courses we run (subject to minor updating from time to time). However, occasionally we are asked to prepare a special version of the course to present to a group of people from a single department. This is generally because the department has a particular large legislative project coming up, and does not already have a pool of experienced instructors.

The course will be particularly useful to that department if its contents are tailored to meet the particular needs of the department. However, preparing a special version of the course creates extra work for the OPC, and in deciding whether to comply with such a request, the OPC has to balance that extra work against the time that may be saved in the long run by having a better trained group of instructors.

The course contents

The 3 components of the course

The course is broken into 3 components (each with a number of sessions):

- the background against which legislation is drafted;
- the instructing/drafting process;
- the parliamentary process.

Component 1—the background against which legislation is drafted

The first component is the background against which legislation is drafted. In this component we cover:

- basic features of Acts (what an Act looks like, how Acts are structured, some standard kinds of provisions and how to find the up-to-date text of an Act);
- Acts of general application (important Acts that drafters and users of legislation must bear in mind when drafting or working with legislation, including the Acts

Interpretation Act[2] and administrative review legislation);

- the Senate Scrutiny of Bills Committee).

As already noted, the Senate is the upper house of the Australian Federal Parliament. It sees itself as a house of review. One of the ways it performs this review role is through its Scrutiny of Bills Committee, which scrutinises all primary legislation introduced into Australian Federal Parliament and comments on whether that legislation conforms to the Committee's guiding principles. If Government legislation does not conform to those principles, it will be criticised by the Committee, and that may lead to the legislation being delayed (until there is a satisfactory explanation or compromise) or rejected.

The guiding principles of the Committee are that legislation should not—

- trespass unduly on personal rights and liberties; or
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers or upon non-reviewable decisions; or
- inappropriately delegate legislative power or insufficiently subject the exercise of such power to parliamentary scrutiny.

Component 2—the instructing/drafting process

The second component is the instructing/drafting process. In this component we cover—

- the role of the instructor in getting policy authority and programming approval;
- the role of the instructor in the drafting process, including how to provide drafting instructions; and
- the role of the drafter.

Component 3—the parliamentary process

The third component is the parliamentary process. In this component we cover—

- getting a Bill ready for parliament (the processes to be gone through in our system once the instructors and drafters are satisfied with a Bill);
- the introduction and passage of Bills (including parliamentary amendments); and
- the commencement of legislation.

The presentation of the course

How the course is presented

The course is a 1-day course and is held at the OPC. The number of participants at each course is 15 or 16. Each course is presented by 2 drafters (a senior drafter and an assistant drafter). They work out between them who will present which of the sessions. Some of the sessions consist mainly of the drafters talking about the topic, using any visual aids they may want to use to illustrate points, and other sessions involve practical exercises which the participants do, breaking into groups to work on a problem.

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[2] The *Acts Interpretation Act 1901* (Cwlth).

The practical exercises seem to be very well received. They give participants an insight into the challenges of drafting, and the importance of providing well thought out instructions to drafters. It also prevents the course from just being a day of lectures. The course is based on a comprehensive set of notes. Each participant is given a copy of these at the beginning of the course and takes it away with them at the end of the day. This has the following benefits:

- the participants have a useful manual which they can refer to later on in their work;
- it gives the drafters presenting the course a certain amount of freedom in the way they choose to present their sessions—they can select certain aspects of a topic that they think should be emphasised, knowing that the printed notes provide fairly comprehensive coverage of the whole topic.

The challenge of pitching the course at a varied audience

As noted above, the course is mainly directed to people with only limited experience of the legislation process. However, we frequently end up with a group that has varied degrees of experience. One of the challenges for the presenters is to cover the basics for those who are really novices, while still providing something new and interesting for those who are more experienced.

Some techniques for dealing with this are (and the relatively small size of the group helps):

- starting off the course by asking all participants to briefly outline their experience with any aspect of the legislation process—this gives the presenters a feel for what the range of knowledge in the group is, and to call on the knowledge of the more experienced people; and
- trying to pace the sessions so that there is time for questions and discussion—this allows individual participants to pursue their particular interests. The course includes lunch, so that provides another opportunity for participants to get a bit more individual attention from the presenters.

How often do we run the courses?

We try to run courses in every break between parliamentary sittings. This means we offer 3 or 4 courses every 3 or 4 months. Since we began offering the course, demand has always outstripped supply. There is always a waiting list for the next course.

All the drafters take a turn in presenting the course. This generally means each drafter will give the course once a year. The OPC recently engaged a training expert to run a presentation skills course for drafters.

Feedback on the course

At the end of each course we ask all the participants to fill in an evaluation form. We ask them for their comments and reactions on each session, and also on the course as a whole. The OPC has used that feedback to modify the contents and format of the course. In a more general sense, the feedback confirms for us that it is worthwhile to continue running the

course, and to develop it further. Also, the feedback has given us the incentive to develop an advanced course.

Benefits of the course

The course does not solve all our problems

From the OPC's point of view, the ideal would be that, having provided this course for a few years now, we could say: "The course has educated the people who give us instructions. The quality of instructions has now improved perceptibly and our job is easier than it used to be". However this would be too broad a claim, and we do not have the evidence to support it. We will never know how life would have been if the courses had not been run. We can however point to some definite benefits, both direct and indirect.

Direct benefits

Some people who come on the courses are completely inexperienced as instructors, and then go into an instructing role. There is no doubt that the course gives them a better start in that role, and that this also benefits the drafters who have to deal with them in their instructing role.

Another benefit for the OPC (on a reasonably superficial level) is that the course gives people a suggested standard form for giving instructions. This is really a checklist of issues that should be covered in instructions (such as policy authority, commencement, transitional issues). Some sets of instructions we get now are obviously following the form suggested in our course, and this is a good thing from our point of view (though it obviously doesn't address the much bigger problems in instructions such as seriously under-developed policy).

We do not see the course as a purely one-way process where we provide education to the participants. One of the benefits of having fairly small groups, and opportunities for discussion and questions, is that the drafters get a better understanding of their instructors' circumstances. This understanding may help drafters to form more realistic expectations of their instructors, and to develop strategies for working with inexperienced instructors.

Indirect benefits

The mere fact of our giving the course makes the OPC more visible. Legislative drafting tends to have a very low profile. Correspondingly, a lot of people, even those working in Government departments and working closely with legislation, have very little understanding of our role. Giving the course has allowed us to enlarge the number of people who have heard of us, who have some notion of what we do and, we hope, who have some appreciation of what it takes to do it. It helps dispel the idea that drafters are basically scribes who translate other people's good ideas into incomprehensible legal jargon.

Finally, the continuing demand for the course suggests that the people who have been on the course think they have benefited, and are recommending it to their colleagues. This suggests that attendance at the course helps the participants, and their colleagues, to perform their day to day duties, even if those people may never have any direct contact with the OPC.

Future plans

The OPC intends to continue to run the course as there is a continued demand for it, and as we see it has having benefits to the OPC, to the people who attend the courses and to the departments in which those people work.

We are also proposing to develop an advanced course. This course would be aimed at more experienced instructors who consider themselves too well informed to attend the basic course we run at the moment. It would also be aimed at people who are responsible for big legislation projects, but who tend to see themselves as project managers or policy makers rather than instructors. We would hope to get them to see that progressing from "big picture" policy making to the creation of a piece of timely and effective legislation is not just a boring technical exercise to be handed over to others, but a complex task that warrants the involvement and concentration of people at a high level in the sponsoring department.

"Prince Splendid and the dream machine"—A fairytale for legislative counsel

John Wilson[1]

Introduction

Once upon a time, in the land of Squeedgee, there was a young and clever Prince. He was admired by everybody and his name was Splendid. He was sometimes called "PS" for short. He worked for one of the Ministers in the Government of Squeedgee. The Ministers met together from time to time in a thing called a Cupboard. It wasn't really a cupboard—that is just the name people called it, although nobody really knew why. It had always been called that since anybody could remember and none could see any reason to change it. That's the way they did things in Squeedgee.

The Minister in charge of the Cupboard was called the Supreme Leader and Ruler (SLR for short.) There were several other Ministers dealing with different aspects of the business of the country. One was in charge of the money and although he had only been doing it for a year, he was quite influential in the Cupboard. The others called him Junior Minister but Almost King (JMAK for short.) Another Minister knew all about the laws; he was so important that people called him Almost God (or A-G for short.)

The job of PS was to advise his Minister on all sorts of important things, and to carry out the Minister's commands. One of the most important things that the Ministers had to do was to arrange for the making of Dreams. These dreams were made in a big meeting-house in the sky called the Heaveny Regents (or HR for short.) The Minister that got the most dreams agreed to by the HR in the course of a year was generally regarded as the best Minister and could expect to get into the Cupboard again the next year.

Instructions

One of the main jobs of Prince Splendid was to prepare the Dream-making Instructions (or DIs for short.) These were then sent to the Jovial Friendly Wizard (or JFW for short) to be put into a form in which they could actually be made into a dream by the HR. It was important that the proposed dream should be presented to the HR in the proper form, because the HR did not really have much time to check on its details. They would often discuss for hours or even days whether it was a good idea for people have the particular dream, but they would not always worry themselves about the details of it. Sometimes people who were having a nice dream would wake up in terror in the middle of the night, finding that the dream had become a nightmare, or did not end properly, or could not be made to work at all. Prince Splendid wanted to avoid this happening to his dreams, so he always made sure that his Dream-making Instructions followed the rules.

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[1] Legal Draftsman, Grenada (West Indies); former First Parliamentary Counsel, Fiji Islands

To help PS to write good instructions, the Jovial Friendly Wizard had issued Guidelines for Dream-making Instructions. These were designed to ensure that a dream when presented to the HR was as nearly perfect as it could be made. They had come from China, which, as everybody knows, is the place where there are lots of Wizards and Dragons and things, so PS was sure they must be very good and followed them whenever he could.

Is it needed?

So, when the PS wanted to ask the Jovial Friendly Wizard to prepare a dream, the first thing he did was to consider carefully whether a new dream was needed at all for the purpose his Minister had in mind. Sometimes, a dream was not the answer. It might be better just to tell people to change their way of thinking about things, or not to expect particular things at all. But if a dream was needed, the next thing that PS always did was to check the existing stock of dreams to see if there was one that, with a bit of dusting off, might do the job perfectly well.

It was surprising how often PS found that there was an existing dream everyone had forgotten about, one that nobody had used for a long time and was just what was needed. The trouble was that PS had never actually seen what dreams there were in the dreams stock, either because he had been taught outside Squeegee, or because he had not been taught about dreams. He had been taught a bit about the Cupboard and the Heavenly Regents, but he had mostly been taught about e-c-o-n-o-m-i-c f-o-r-e-c-a-s-t-s, about f-l-o-w-c-h-a-r-t-s, about purchasing of outputs, performance agreements and annual corporate plans. (Yes, children, there are such things, though most people think that those are just fairytales as well.)

In fact, PS had not really been taught anything much about the nature of dreams, their function and operation, or how to make them. He had to pick all that up as he went along, and he sometimes got a rather confused picture of the whole process. Generally, that did not seem to matter very much, because, as I said earlier, the Heavenly Regents did not look too closely at the dreams they were asked to make and as long as several of them were made each year, everyone was happy. Also the Jovial Friendly Wizard was a Jolly Fast Worker, so it did not matter very much if the Dream-making Instructions were delivered only a few days before the HR was due to meet—or even if they hardly existed at all.

What will it achieve?

Still, PS was a conscientious sort of chap, and he did try to prepare the Dream-making Instructions properly. So the third thing he did was to decide just what it was that the dream was supposed to achieve. Some dreams were to encourage people to do things they otherwise might not want to do such as pay money to the Government. Others were to discourage people from doing things they might otherwise want to do, such as polluting the air and sea and land and destroying all the forests. (Believe it or not, children, there were in

those days actually people who needed to be told not to do such things. They didn't seem to realise that they needed clean air to breath and healthy crops to eat.)

Every dream had to have a purpose and a proper shape. If people were to be encouraged to something they might not otherwise want to do, they had to know what would happen to them if they didn't do it. If people were to be discouraged from doing something they wanted to do, they had to know what would happen to them if they did it. Sometimes, the dream would allow people to do things, but only if they got permission from the SLR or another Minister on a piece of paper issued by the Minister or one of his elves.

What is in it?

Sometimes the dream would set up a special body to provide people with the things they wanted, or to ensure they didn't do things they shouldn't. Some dreams created jobs for elves to do and gave them quite important parts to play in making the dream come true. Quite a few dreams allowed a Minister to make little dreams, or dreamlets, to fill in the gaps in the main dream if he thought it was necessary. Usually the Minister had to check first with his colleagues in the Cupboard to see if it was all right to make dreamlets.

Some dreams only altered existing dreams to add some new details, or to remove a detail that was no longer wanted. Others replaced existing dreams altogether if they had got worn out. PS made sure that he understood all these different types of dreams, and in the Dream-making Instructions he set out exactly what kind of dream his Minister had in mind for the HR to make. He didn't leave the Jovial Friendly Wizard to have to guess things. This made the JFW very happy.

How will it operate?

The fourth things that PS in the Dreaming Instructions was to explain to the Jovial Friendly Wizard just how the dream was expected to operate; who would be responsible for every part of it, how much it would cost, how it would affect people's lives and so on. He let the JFW know exactly what it was that the dream was supposed to achieve. This also made the JFW happy.

Consultation

The fifth thing the PS did was consult other people before sending the Dreaming Instructions. Those people included anyone in the Government or outside who might be expected to have something useful to say about them. In particular he consulted the elves who dealt with people matters (People Supply Council, or PSC for short.) And he consulted the elves in the Ministry of JMAK, the one that dealt with money.

Bill of Rights

PS also checked that the DIs were consistent with the Underlying Dream, the dream with which all the other dreams had to be consistent. Especially the part of it called, for some obscure reason, Guillaume des Droits (or William Notleft, in Plain English.) The effect of this part on everything the elves did was rather important, though people did not always know just why. Perhaps it was because the Guillaume's ancestors could be traced back to the Norman Conquest—or at least to the Great Dream of a couple of centuries later in the land of the Angels.

Legal advice

Another department that PS always consulted before issuing the Dream-making Instructions was the Slumberland-Guide (or S-G for short.) The S-G was the chief elf in the Office of the Almost-God. He had under his command several elves who were able to interpret dreams and knew what dreams there were in other countries and how they had been interpreted there. These elves could also tell the PS about any particular problem with his proposed dream that he might not have thought about, and how such problems had been dealt with in other countries. The PS was rather keen to have this sort of advice, because he did not want his dream to fall foul of the dreaded Court of Soothsayers. These were people who could be asked to interpret dreams by the people who had them, and sometimes they said that dreams meant something quite different from what the PS or the Cupboard or even the Heavenly Regents thought they meant. Consulting the S-G could avoid this sort of problem; though not always, now I come to think about it.

One of the things the PS had to be careful about was not preparing a dream for making by the Heavenly Regents while the Soothsayers were in the middle of saying sooth on the same subject as the dream. Doing this always made the soothsayers rather cross, and threw everyone into confusion. PS also tried to encourage his Minister not to propose that a dream should be dreamt before it had actually been made. This tended to give people headaches.

Consultants

Another thing the PS was rather careful about was accepting merchandise from Dream Merchants who peddled their wares around Squeedgee and the neighbouring countries. Although most of these Dream Merchants were well intentioned, they often did not realise the effect of their dreams on the countries they sold them to. Their dreams were usually taken from much bigger countries and didn't always suit places like Squeedgee. They might be too complicated, or too expensive, or be based on a different system.

Some Dream Merchants only advised on what dreams might be useful, but others sold what looked like complete dreams to the PS, who would then send them to the JFW for what was called "vetting". The trouble with such dreams was that the merchants often did not know

about the Interpretation Dream (known in Squeedgee as "CAP. 7") without which none of the other dreams worked properly. Or a dream merchant might try to incorporate a different version of CAP. 7 in a dream, which created a lot of confusion. The trouble was that the PS did not know how to tell whether a dream offered by a Dream Merchant was any good or not. This was because the PS had not learnt at school anything about the making of dreams, as I have already mentioned. The problem was made worse by the fact that the Dream Merchants were sometimes sent by the rulers of big countries who were keen that the people of Squeedgee should dream their type of dream.

In fact, if the PS thought about it, he would have realised that for the cost of a single dream from a Dream Merchant, he could afford several dreams made by assistant Wizards in the Office of the JFW. But for some reason, there was supposed to be more powerful magic in a dream from a Dream Merchant than in a homemade one. This was a big mistake. The Dream Merchants often had their own reasons for wanting to encourage Squeegee to buy one of their dreams. They sometimes hoped that their dream would become the model dream for other countries, or even for the whole world! So they put lots of different dreams together in a big omnibus dream. One example was the Sustainable Development Dream, which would have given people nightmares if they actually dreamt it. The JFW, when he began work, soon put a stop to that, I can tell you!

Memorandum

Anyway, having gathered all the information he needed about the proposed dream, and its likely effects on people who dreamt it, the PS put the information down in joined-up writing on a big piece of paper called a m-e-m-o-r-a-n-d-u-m. He then sent this to the Jovial Friendly Wizard and asked him to prepare a beautiful dream for approval by the Cupboard and then by the Heavenly Regents. The JFW was always ready to oblige, but although he was a Jolly Fast Worker, as I have said, he could not actually do miracles and he needed enough time to prepare the dream.

This question of time is a very strange one, children, for it seems to have the effect of making normally intelligent people behave completely irrationally. Perhaps they think that preparing a dream doesn't need time, but I can assure you it does. And not only time to write it and draw the pictures and colour it, but time for the Cupboard to approve it and for the Heavenly Regents to make it. Let me try to explain. Are you still sitting comfortably?

Timetable

The rules are really quite simple. Before the HR can be asked to make a dream, the dream must be told to everybody so that they can object to having it. After all no one likes being made to have a dream they don't want, especially in a d-e-m-o-c-r-a-c-y. So the proposed dream has to be published as a Guillaume (Bill in English) in the town newspaper called the G-a-z-e-t-t-e. This must be done at least 30 days before the HR is due to meet. The Gazette is only printed on a Friday (for reasons that it would not be appropriate to discuss in a story

for children). And the Cupboard, which has to approve the proposed dream before it is put in the Gazette, only meets every other Tuesday (ditto). Moreover, the Heavenly Regents only meet every few months (more ditto).

Although 30 is quite a big number—more than anyone has on his or her (or its) fingers and toes—PS went to a good school and can count up to 30. So it should be quite easy for PS to work out which issue of the Gazette the dream will have to be published in. If that is too difficult, there is a nice big chart, with lovely coloured squares on it, which is issued to all the Ministers and their senior elves, showing when the HR and the Cupboard will be meeting during the year.

Unfortunately, PS keeps his chart on the wall behind his head and always forgets to look at it before sending Dream-making Instructions to the JFW. I think perhaps the Wicked Witch of the West (WWW) casts a spell on the PS and makes him forget all the rules about the timetable for publishing dreams.

Of course, before the dream is published, it has to be approved by the Cupboard, and the Cupboard needs time to read the proposal, only a week, but still PS often forgets it. And of course the JFW and his assistants need time to polish the dream to make it nice and shiny before it goes to the Cupboard. This might involve several attempts at the dream, and they might need to be looked at by quite a lot of people.

What all this means is that, even if PS wants only a very simple dream to be prepared by the Jovial Friendly Wizard, he must get the Dream-making Instructions to the JFW at least 10 weeks before the start of the meeting of the Heavenly Regents when it is to be made. If the dream is a complicated one, the PS should allow several months for the JFW to do his job. Otherwise, the JFW might not be such a Jovial Friendly Wizard but might turn out to be a Jolly Fierce Warlock instead!

No drafts please

There's one other thing that is very bad for the JFW and that is a malfunction called "tunnel vision". This happens when the PS, instead of sending proper Dream-making Instructions, sends the JFW a complete imitation of a dream, usually sold to the PS by one of the Dream Merchants. The trouble is that the JFW, who is only human after all, will be tempted to assume that the imitation, which looks like a dream, sounds like a dream, tastes like a dream, feels like a dream, and perhaps even smells like a dream, is in fact a dream when it might be nothing of the sort.

The JFW sometimes calls this the "Crossword Puzzle Syndrome" which means that if the crossword puzzle in the newspaper has been filled up with letters, it is natural to assume that they make up the correct words, when on inspection they turn out just to be random letters.

Rather often a dream purchased from a Dream Merchant turns out to be like that, and it can take a lot of trouble, first to identify the errors and then to correct them. Please, children, try to avoid giving the JFW tunnel vision; and try to be alert to the Crossword Puzzle Syndrome.

Envoie

I called this a fairy-tale. That's because it describes how PS goes through all the right steps in preparing Dream-making Instructions. Unfortunately, all too often this really is a fairytale. The reality is that the JFW receives a phone call or a two-line note from the PS saying "We need a dream by tomorrow. Please prepare it for us." At those times the JFW once again turns from a Jovial Friendly Wizard into a Jolly Fierce Warlock. However, he still, miraculously, manages to produce the dream. Children, I am sure you will agree that these things ought not to be.

I hope that this tale of Prince Splendid and the Dream Machine will help to ensure that they do not happen in future. Sweet dreams!

Parliament cannot delegate its legislative power: A British constitutional reality or myth?

Dennis Morris[1]

Introduction

With a view to answering the question posed in its title, this article discusses whether or not there is any British constitutional principle that would prevent the British Parliament from enacting the following hypothetical section:

> **Regulations implementing the United Nations' Multinational Corporations (Controls) Convention**
>
> (1) The Secretary of State may make regulations providing for such matters as are necessary to enable the performance of the obligations of the United Kingdom, or to obtain for the United Kingdom any advantage or benefit, under the Convention.
>
> (2) In particular (but without limiting subsection (1)), the regulations may deal with the following matters:
>
> (a) the procedure for dealing with applications for international registration of multinational corporations that are to be filed with the International Bureau through the intermediary of the Multinational Corporations Registration Office;
>
> (b) the procedure for dealing with requests to extend to the United Kingdom the protection resulting from international registration of multinational corporations;
>
> (c) the protection given to protect multinational corporations in the United Kingdom;
>
> (d) the circumstances in which such protection ceases and the procedures to be followed in cases of cessation;
>
> (e) the cancellation of an international registration at the United Kingdom's request, as contemplated by Article 6 of the Convention;
>
> (f) the effect of cancelling an international registration.
>
> (3) Regulations made for the purposes of this section—
>
> (a) may be inconsistent with this Act; and
>
> (b) prevail over this Act (including any other regulations or other instruments made under this Act), to the extent of the inconsistency.
>
> [(4) Definitions].

This hypothetical section closely follows section 189A of the Australian *Trade Marks Act 1995*, which was inserted by the *Trade Marks Amendment (Madrid Protocol) Act 2000*

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(Cwlth). Only the words in Italics differ from those of section 189A. However, this article does not deal with issues arising under Australian law but rather is concerned with whether the British Parliament would be free to enact a provision in an analogous form should it so wish. For the sake of argument, I have assumed that if a Bill containing a similar provision were to be introduced into the British Parliament, its provisions would—

(a) neither include a provision making the imaginary convention referred to in the hypothetical section part of the UK's domestic law,

(b) nor include that convention's text, either in a schedule or elsewhere.

Comparison with Henry VIII clauses

In a paper read to the Third Commonwealth Conference on Delegated Legislation, the late Lord Rippon of Hexham, QC, said:

> In recent years some of us in the UK have been expressing concern over the ever increasing quantity and decreasing quality[2] of our legislation. .... The fault lies with Government and Parliament. Although our Bills get longer and longer, increasingly they are merely skeletal, leaving vital details to be settled by others and regulations.[3]

Lord Rippon went on to deal in particular with Henry VIII clauses and the UK constitutional problem their ever-increasing use had by then created. The use of this drafting device has been criticised with increasing ineffectiveness ever since the Donoughmore Report of 1926. Indeed, whereas not a single Henry VIII clause was enacted by the British Parliament during World War 2[4], this now frequently employed legislative device hardly raises an eyebrow at Westminster. The use of such clauses is probably part of the "spin off" resulting from the shift of the United Kingdom's most significant political forum from Parliament to the television studio.

A Henry VIII clause has been described as "a provision in a Bill that enables primary legislation to be amended or repealed by subordinate legislation with or without further parliamentary scrutiny".[5] In contrast, section 189A of the *Trade Marks Act 1995* (Cwlth)[6] seems to be even more far reaching in that, as far as regulations made under the section are concerned, it dispenses with the need to slot the regulations into that Act's scheme by way of amendment. Thus, under the section, the Governor-General of Australia in Council is free to make whatever regulations are thought to be appropriate (irrespective of whether they are consistent with the enabling Act) so long as they are necessary to enable the relevant treaty

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2 I question this.

3 The paper is published in [1989] *10 Stat LR* 205.

4 However, one should bear in mind the very extensive powers conferred on the Executive by the *Defence of the Realm Act 1914* (UK).

5 Review (October 1994) of the first year's work of the House of Lords' Select Committee on the Scrutiny of Delegated Powers, para. 16.

6 I.e. the enactment that the hypothetical section all but replicates.

obligations to be performed. Having regard to subsection (2) of the hypothetical section, those regulations could, at the very least, have very serious financial consequences for a multinational corporation that was affected by the legislation.

The earliest statutory instruments[7] seem to date from the 1820s-1830s and for almost a century those responsible for preparing subordinate legislation, other than "machinery legislation" such as commencement orders or regulations fixing fees, charges and so on, ensured that legislative power was delegated but not abrogated. Until recently at least, the extent of the relevant power granted to make subordinate legislation was regarded as being one of the crucial considerations in judicially determining the validity of such legislation. This flowed from the general acceptance, as being axiomatic, that under the British constitution, Parliament's ability to make laws could not be delegated to anyone else. This principle may have been first established at the beginning of the 1880s when Gladstone's first Irish Home Rule Bill was introduced. The Bill generated much discussion (sometimes heated) as to whether or not the British Parliament could transfer sovereignty and it seems likely that it was then that the question of whether Parliament could delegate its legislative function first arose.[8] But irrespective of whether this was in fact the case, the principle appears to have been settled before the end of the nineteenth century. So if power to make subordinate legislation were to be included in proposed legislation, it was (because of Parliament's then accepted inability to delegate its legislative function) thought crucial to devise a constitutional safeguard, namely the ultra vires principle setting parameters within which the delegated power must be exercised. For once an enactment circumscribed the grantee of the power—and thus exposed the exercise of the power to legal scrutiny—Parliament must be regarded as having fallen short of delegating (or as "semi-abrogating")[9] its sovereign power to legislate on any matter to which subordinate legislation made under the enactment could relate.

The relevant case law

As far as the case law is concerned, the two earliest cases in which the inability of Parliament to delegate its ability to make laws was an issue were both heard by the High Court of Australia. In *Roche v. Kronhiemer*,[10] it was submitted (inter alia) that there is no Commonwealth power to hand over to the Commonwealth Executive the whole of the power of that Parliament to legislate as regards a particular matter. But the argument that the Commonwealth Parliament was so circumscribed seems to have been based on the

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7 Sometimes statutory instruments are called statutory rules or legislative instruments, but whatever they are called they are a form of subordinate legislation. (Sometimes the latter is called subsidiary or delegated legislation.)

8 It is possible that the well-known constitutional lawyer A.V. Dicey also raised this issue at that time.

9 Because it had no power so to delegate, Parliament could always legislate as regards matters covered by a previously granted power to make subsidiary legislation. But perhaps this may now no longer be the case.

10 [1921] 29 CLR 329.

assumption that the Australian Constitution[11] separates Commonwealth executive and legislative functions in the sense expounded by Montesquieu. Unfortunately, neither of the judgments in Kronhiemer expressly deals with the submission referred to. In the second Australian case, *The Victorian Stevedoring and General Contracting Company Proprietary Ltd v. Dignan and another*,[12] questions broadly similar to those in Kronhiemer were in issue and the Court delivered long and detailed judgments.[13] In that case, the Montesquieu doctrine of the separation of powers was again discussed. Although holding that the Commonwealth Parliament could not delegate as described, the Court said it was not because that doctrine applied in Australia but rather because, as in the United Kingdom (but not in the United States), the Executive is accountable to Parliament. However, none of the dicta in Dignan is as forthright as that of Hanna J in *Pigs Marketing Board v. Donnelly (Dublin) Ltd*., who said (as regards Irish constitutional law):

> It is axiomatic that powers conferred upon the Legislature to make laws cannot be delegated to any other body or authority. .... But the Legislature may, it has always been conceded, delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the powers so delegated and the manner in which the statutory provisions shall be carried out.[14] [Emphasis added]

This passage was later approved of by Hedderman J *in The State (Gilliland) v. Governor of Mountjoy Prison* (Irish Supreme Court).[15] Although neither Hanna J nor Hedderman J expressly said so, I think it can be inferred, as regards Irish legislation at least, that where powers are given to make subordinate legislation, parameters must be included in the enabling Act by reference to which it would be possible to decide whether or not, in a particular case, this or that might be included in the subordinate legislation. So in reposing authority in the Executive to legislate by means of subordinate legislation, even if he believed the constitutional principle mentioned in this article's title is now academic, I think a prudent draftsman should, in the absence of clear judicial authority, nonetheless "weave" the principle of ultra vires into the relevant Bill, even if that Bill provided that the validity of an instrument made under the Bill were not to be open to question in legal proceedings. Take the following case. Assume the British Parliament had enacted legislation giving a Secretary of State a power to make regulations. Assume also that, irrespective of the desirability of having the ultra vires principle apply to the regulation-making power, the relevant section were couched in terms that in fact disregard it. Then if, in legal proceedings, the validity of regulations made under the section were questioned solely on the ground that it was unconstitutional for Parliament to ignore, or alternatively to override, the ultra vires principle

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11 Then wholly contained in the *Commonwealth of Australia Constitution Act* (1900).

12 [1931] 46 CLR 73.

13 Those of Dixon and Evatt JJ in particular.

14 [1939] IR 413, 421.

15 [1987] IR 231.

when enacting the section, should the court find in favour of the applicant, it would surely do so by declaring the purported grant of the regulation-making power to be constitutionally invalid rather than by impugning the regulations purporting to have been made in exercise of the power?

So can that constitutional assumption still be made as regards the United Kingdom? Before grappling with this difficult question, it is appropriate to consider two questions that the hypothetical section raises. One relates to the ultra vires principle and the other to the relationship between the common law and international law.

The ultra vires principle

Regarding the first question, in Dignan, Evatt J in referring to executive powers to make subordinate legislation said:

> It is true that the extent of the power granted will often be a very material circumstance in the examination of the validity of the legislation conferring that power.[16]

And earlier Dixon J, as that particularly distinguished future Australian Chief Justice then was, said, having conceded a Legislature's ability to confer such executive powers:

> This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be... There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.[17]

So can the parameters set by the hypothetical section be faulted on a ground either Dixon or Evatt JJ mentioned? I rather think not. For not only are they precise but, in addition, they clearly state the purpose for which the power is being granted. Also, as will be noticed, the section has been cast in a form that would not require Parliament to debate the imaginary UN convention. However, I do not think this matters. Indeed, there is an excellent precedent. In 1972, when the European Communities Bill was being debated in the House of Commons, strenuous and furious efforts by the Opposition to have the EEC Treaties themselves discussed (discussions that the Government ardently wished to avoid) were thwarted. The Government was well-served by parliamentary counsel for, as those counsel must have foreseen, the Chairman of Ways and Means ruled the discussion out of order because of the Bill's non-inclusion of a provision "enacting" those treaties.

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[16] *Op. cit.* note 12, at p. 119.

[17] *Ibid* at 101.

The relationship between the common law and international law

As to the second of the two questions referred to, assume that the object of the hypothetical section is to enable regulations to be made whose purpose would be to ensure that the United Kingdom's treaty obligations as regards imposing agreed treaty restrictions or controls regarding specified activities of multinational corporations would be discharged. Also assume that, but for the regulations, these activities could be freely pursued by anyone anywhere in the kingdom. And thirdly, bearing in mind the principle that in making domestic law, the Legislature cannot be fettered by any inconsistent provisions of international law.[18] So while the Sovereign has prerogative power to accept treaty obligations these are neither binding on, nor (where appropriate) can they be relied on, by any person in the realm in the absence of legislation to that effect. Nowadays, the most common method employed in the United Kingdom to extend treaty obligations so that they affect persons other than the State is to enact legislation incorporating a (usually scheduled) treaty or other international agreement into the domestic law. But is formal legislative incorporation of such an agreement always necessary? Having regard to the *European Communities Act 1972*, it seems not. For under that Act a new cause of action, an "enforceable Community right" was created. And as Sir Geoffrey Howe, who had steered the Bill for that Act through the House of Commons, said in 1973, the EEC Treaties had not been "incorporated into or made identical with our domestic law. Our courts are simply required to give direct effect to Community law according to its own nature."[19] But as the early EEC Treaties are the basic law or grundnorm from which those rights and European Union law, according to which they are to be enforced in the UK, both spring, the relevant provisions of those instruments must, I suggest, impliedly enjoy a recognition of some sort within the UK's *corpus juris*? So if this be correct, merely referring to the (supposed) UN Convention and its implementation to set parameters as regards the scope of any regulations to be made under the hypothetical section would, I believe, suffice.[20]

The question of delegation

As regards the question of delegation, by enacting the hypothetical section, the British Parliament would delegate the whole of its power to legislate as regards implementation of the imaginary UN convention. For the Australian enactment on which the hypothetical section is modelled, section 189A of the *Trade Marks Act 1995* (Cwlth), rather suggests that those responsible for it foresaw possible conflicts between that Act and what would be necessary to include in regulations implementing the Madrid Protocol in Australia. A subsection in identical terms to those of subsection (3) above was therefore included. This

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[18] This is how the common law position was summarised by the US Supreme Court in *Mortensen v. Peters* [1906] 8F, 93.

[19] Sir Geoffrey Howe: The *European Communities Act 1972* (1973) *International Affairs*, 1.

[20] It seems unlikely that Parliament would forego an opportunity to discuss and either approve of or reject the international agreement in question were it to consider proposed legislation analogous to the hypothetical section.

has the appearance of going much further than a "classical" Henry VIII clause.[21] But is there really any difference in principle? The Henry VIII formula enables a statute to be amended or repealed, its usual purpose being to avoid potential conflict, whereas the hypothetical section itself operates to remove the conflict. Indeed, one could constitutionally knit pick by arguing that under it no power to amend or repeal legislation is given and so it is constitutionally less sullied! And anyway subsection (3) above is no more radical than, say, section 108(9) of the *Children Act 1989* (UK), which enables the Lord Chancellor to amend or repeal any (other) enactment in a manner that he considers necessary or expedient in consequence of any provision of that Act. Both powers are circumscribed: one is limited to doing what is necessary to implement a convention and the other to avoiding conflict between provisions of the 1989 Act and other enactments. Moreover, subsection (3) above is "small constitutional beer" as compared with, say, section 17(4) of the 1989 Act, which enables the Secretary of State to add by order any further power or duty to those mentioned for the time being in Part I of Schedule 2 to that Act. So were a provision similar to the hypothetical section's subsection (3) to appear in a British Bill, it seems unlikely that any Member of Parliament would turn a hair.

A Bill implementing a convention or other international agreement would of course probably contain many provisions of an administrative or machinery nature. In passing, perhaps I should mention that I doubt whether regulations under the hypothetical section could create offences. But as regards the hypothetical treaty obligations imposed on the United Kingdom, certain steps, and all and only those steps, would need to be taken in exercise of the power to make regulations were the United Kingdom to be enabled to perform those obligations. In other words, a failure to exercise all of the powers that section gives would leave the Government unable to fully discharge those obligations. Accordingly, in creating executive power to do everything necessary to implement the Convention, the whole of Parliament's legislative power as regards that implementation is thus delegated.[22] So could the British Parliament so legislate?

Could the British Parliament so legislate?

Before 1973 at least, by adapting a dictum of Evatt J in Dignan,[23] it could have been argued that the constitutional impediment to delegating the legislative function arose—

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21 Which is limited to amendments or repeals.

22 The fact that the delegated power is not exclusive, *i.e. Parliament* could itself implement the Convention, would, in the circumstances being considered, be irrelevant.

23 In that case, Evatt J had this to say at p. 123:

> On final analysis therefore, the Parliament of the Commonwealth is not competent to 'abdicate' its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which

(a) not because Parliament is bound to exercise or perform any of its legislative powers or functions,[24]

(b) nor because the Montesquieu doctrine operates and so prevents its granting authority to anyone else to make instruments having legislative effect,[25]

but because every one of the Acts enacted by Parliament must, to some extent, establish principles as regards, or otherwise regulate, the particular subject matter or branch of the law to which the Act relates. So a law by which, as regards a particular matter, Parliament gave all its law-making authority to a Secretary of State or other person would be bad merely because it failed to pass the test mentioned. In other words, it would have failed to meet the requirements that the connotation of the word "law" itself envisages. For example, an Act that merely provided that contracts of employment are to be fair and then went on to give a Secretary of State power to make such regulations as are necessary to give effect to the Act would, in my view, fail such test. Therefore, before 1973 at least, the law would be of no effect. However, the *European Communities Act 1972* seems to have destroyed this argument. This is because Parliament, through that Act, as well as delegating to what is today the European Commission a power to make laws for the United Kingdom, also delegated a power to make laws relating to a range of unspecified matters. Indeed, if the Commission's powers continue to expand as they have done during the past 5 years, then by 2010 the British Parliament may have less control over how revenue is to be raised for the Exchequer than that currently enjoyed by a local authority in relation to funding its services.

While the 1972 Act does not accord with the constitutional principle[26] that this article is concerned with, a court might hold that the constitutional circumstances in which that Act was enacted and the consequences of its enactment were exceptional in that the United Kingdom was thereby able to enter a union of states founded on a separate and distinct body of law. Accordingly, a court might hold that the principle of non-delegation must give way in those circumstances. But would such a distinction have any real constitutional significance? I doubt it for two reasons. First, even though membership of the European Union has engendered the application of the primacy of European Union law principle,[27] British Judges still appear to be reluctant to question the validity on other grounds of any enactment. Indeed, as recently as 1995 Lord Mustell could say:

> Parliament has a legally unchallengeable right to make whatever laws it likes.[28]

Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the last test mentioned.

[24] For it may elect not to do so, but clearly this would not happen as regards supply.

[25] For this is now done as a matter of course.

[26] If indeed there is such a principle.

[27] A matter about which neither the Treaty of Rome, nor any other EEC/EU treaty, has anything to say.

[28] *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 All ER 244, 267 j.

So were a court pressed to strike down the hypothetical section on the basis of its being repugnant to the constitutional principle referred to in the title to this article, I feel certain it would refuse, if only because the courts will go to great lengths to avoid creating a "political crisis". Indeed, it might, by invoking my second reason, apply the de minimus principle! And that reason is the ease with which a draftsman can "outflank" the application of the non-delegation principle. For example, if the hypothetical section were to provide that the imagined UN convention was to have the force of law and then to empower the making of such regulations as would be necessary to give effect to the convention, the constitutional principle could not then be raised.

If the United Kingdom had a wholly written constitution and if that constitution had vested what might be called the state's supreme legislative function in the Queen in Parliament, then the dictum of Hanna J quoted earlier in this article[29] would[30] be as true of the British constitution as it is of that of Ireland.[31] However, in view of the foregoing, it seems reasonable to regard Parliament's inability to delegate its legislative power as being truly mythical. But that is not to say that references to it will fail to earn brownie points in parliamentary debate. For, like "the necessity" of including laying provisions as regards statutory instruments, obeisance will be made to it in the name of the sovereignty of Parliament, even though those so acting will be aware that in reality it is nothing but an empty formula. Thus has a stage in British constitutional development now been reached when it is open to coin a new British constitutional maxim: *Vox sublegis vox Dei*[32]?

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[29] See p. 52.

[30] Leaving aside the constitutional implications of British and Irish membership of the European Union.

[31] See Article 15.2 of the *Irish Constitution*.

[32] In other words "Whatever says the subordinate legislation is divinely revealed truth."

The importance of getting savings and transitionals right: Two contrasting cases

Duncan Berry[1]

Introductory note

The following two cases from two different jurisdictions relate to the substitution of statutory offences for common law offences. The first case, a decision of the Court of Final Appeal in Hong Kong, concerns legislation containing a defective savings provision for certain common law offences alleged to have occurred in Hong Kong before the commencement of the enactment containing the substituted statutory offences. The second case, a decision of the Irish Supreme Court, concerns legislation that contained no savings provision at all for offences alleged to have been committed before the commencement of the enactment containing the substituted statutory offences. As will be seen from reading the two case notes below, the two courts came to opposite conclusions, despite the facts being substantially similar.

The Interpretation Acts of most jurisdictions contain provisions that (among other things) provide that the repeal of a statute does not affect its previous operation. However, those Acts do not normally contain corresponding provisions dealing with the abolition of rules of common law.

On one view, the repeal of an enactment, or the abolition of a rule of common law, should not of itself affect anything that happened before the coming into operation of the repealing or abolishing provision, particularly if the new enactment replaces the repealed enactment or abolished rule with a substantially similar provision. In the case of the abolition of a common law offence it would mean that the offence would be abolished only insofar as it related to conduct committed after the commencement of the enactment abolishing the offence, leaving conduct committed before that commencement still open to prosecution.

The other view is that an enactment abolishing a common law rule for which a statutory provision is substituted has the effect not only of prospectively abolishing the rule, but also retrospectively abolishing its application to everything that happened before coming into operation of the statutory provision. In the case of the abolition of a common law offence, it would mean that the offence was abolished for all intents and purposes and all conduct committed before the commencement of the enactment abolishing the offence could no longer be prosecuted.

In the Hong Kong case, the Hong Kong Court of Final Appeal thought that, although the statute was a penal one, no injustice would be done to offenders who were prosecuted for

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[1] Consultant parliamentary counsel, Irish Office of the Parliamentary Counsel to the Government.

criminal conduct for which they would have been held liable had that conduct been discovered and made the subject of a charge before the commencement of the relevant enactment. The Court felt that it would be a grave injustice to allow such offenders to escape the criminal justice system. In the opinion of the Court, the substitution of common law conspiracy (with the exception of conspiracy to defraud) by a statutory equivalent was clearly intended to produce a continuum.

In the Irish case, the Irish Supreme Court came to the opposite conclusion. In the absence of an effective savings provision, the Court held that the relevant common law offence of assault ceased to exist after the commencement of the enactment contained the provision abolishing the offence. The upshot was that the alleged offender could no longer be charged with the offence. The Court took the view that, unless special provision to the contrary is made by statute, after the expiration of a law no penalty or punishment should be inflicted for a violation of that law, even though it may have been committed while the law was in force. It was observed that, in general, retrospective offences were anathema to the rule of law and due process. However, for the reasons given by the Court of Final Appeal in Chan, I would question the validity of the statement that the offences concerned were "retrospective". Assuming it could be proved that the conduct was committed, surely it was "criminal" at the time of commission. Since no new offence was created, how can it be said that the offences were retrospective?

Nevertheless, whichever view is correct, the prudent course for a legislative counsel who is substituting a statutory provision for a common law rule would seem to be to at least carefully assess whether an appropriate savings provision is required to deal with situations that will have occurred before the provision comes into operation. If on reflection it is considered that such a savings provision is needed, the next step is to ensure that the provision is drafted effectively and, in particular, that it is comprehensive enough to cover all situations arising before the commencement of the statutory provision.

Chan Pun Chung and Another v. the HKSAR[2]—[2000] 3 HKLRD 498 (Hong Kong Court of Final Appeal)

Introduction

On 2 August 1996, the Crimes (Amendment) Ordinance 1996 came into operation. The question was whether the abolition on that date of common law conspiracies in Hong Kong (other than the offence of conspiracy to defraud) prevented an information from being laid on or after that date with respect to conspiracies occurring before that date. One would have

[2] A reference in the note to an 'Ordinance' is a reference to an Ordinance of the Hong Kong Special Administrative Region of the People's Republic of China.

thought that the question would have been relatively easy to answer, but the issue was complicated by a defective savings provision.

The relevant legislation

The amending Ordinance amended the Crimes Ordinance (Cap. 200) by adding a number of new provisions to that Ordinance. Among the provisions was section 159A, which created the statutory offence of conspiracy. The section was expressed to be subject to Part XIIA of that Ordinance, which included section 159E. Section 159E abolished common law conspiracies except conspiracy to defraud and included some savings and transitional provisions in consequence of the abolition of that offence. The relevant parts of the section read as follows:

> (1) Subject to the following provisions of this section, the offence of conspiracy at common law is abolished.
>
> (7) Subsection (1) shall not affect–
>
> (a) any proceedings commenced before the time when this Part comes into operation; or
>
> (b) any proceedings commenced after that time against a person charged with the same conspiracy as that charged in any proceedings commenced before that time.

Appellant's contention

The parties accepted that conduct committed after the abolition that would have amounted to a common law conspiracy if it were committed before the abolition of the common law offence would not be subject to the old law. To this extent, they agreed that the abolition operated prospectively. The difference between them was about the effect of the abolition of the old law on conduct committed before the abolition. The question thus was whether, despite section 159E, persons who committed conspiracies before 2 August 1996 could be charged and, if found guilty, be convicted of and punished for those conspiracies even though they had not been charged with having committed those offences before that date.

The word "abolished" in section159E (1) raised the question as to when the abolition of the common law offence of conspiracy took effect. One answer was that it took effect only on 2 August 1996, the date on which sections 159A and 159E came into operation. The appellants, on the other hand, contended that the effect of section 159E(7) was to abolish the common law offence of conspiracy so that no one could be charged with the offence that related to conduct that took place before that date, unless an information had been laid before then.

The findings of the CFA

The Court began by considering the implications of acceding to the appellants' submission. Even though section 157E(7) would be otiose unless one were to attribute to the Legislature

an intention to abolish the common law offence retrospectively, the Court did not think it was possible to attribute such an intention to the Legislature. Such a result would, in the Court's opinion, be bizarre and utterly at odds with the Legislature's obvious intention that conduct such as that of the appellants should remain criminal, albeit under statute rather than at common law.

The Court then went on to consider the House of Lords decision in Inco Europe v. First Choice Distribution [2000] 1 WLR 586. In that decision, Lord Nicholls of Birkenhead[3] showed[4] that in plain cases of drafting mistakes the interpretative role of the courts properly includes, under certain conditions, the power of adding words to, omitting words from or substituting words in a statute so as to preserve the obvious purpose of that statute. As to those conditions, his Lordship made the following observations[5:]

> Before interpreting a statute in this way the court must be abundantly sure of three matters:
>
> (1) the intended purpose of the statute or provision in question;
>
> (2) that by inadvertence the drafter and Parliament failed to give effect to that purpose in the provision in question; and
>
> (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

The third of these conditions is of crucial importance.

However, as Lord Nicholls pointed out, even when these conditions are met, a court may nevertheless find itself inhibited from interpreting a statutory provision in accordance with what it found to be the underlying intention of Parliament. For example, the alteration in language may be seen to be too far-reaching. As Scarman LJ said in Western Bank Ltd. v. Schindler [1977] Ch. 16:

> … the insertion must not be too big, or too much at variance with the language used by the Legislature.

In the present case, the Court thought that the drafter of the legislation must be taken to have included the section 159E(7) transitional provision thinking that it was necessary or at least avoided doubt. However, the Court found that the drafter could not possibly be taken to have included the provision thinking that it operated so as to confer immunity from prosecution on people like the appellants. The Court therefore had no doubt that the inclusion of section

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[3] In a speech with which all the other Law Lords hearing that appeal agreed.

[4] At p.592 C-H.

[5] At p.592 F-G.

[6] At 18.

159E(7) was a drafting mistake. Moreover, it was satisfied that the conditions identified by Lord Nicholls in Inco Europe obtained in the present case. On the question of the relevant statutory provisions being penal, the Court held that they should not be construed strictly because, although penal, they did not create new criminal liability.

Intention of legislation

In 1994, the Hong Kong Law Reform Commission in its report on "Codification: Preliminary Offences of Incitements, Conspiracy and Attempt" had made various recommendations with regard to these offences. Regarding common law conspiracies, the Commission said[7]:

> There is no real challenge to the rationale for and the continued existence of the offence of conspiracy.... There are aspects of the law, however, which remain imprecise.

The desirability of having conspiracy as a punishable offence was never in doubt. It was the scope of the law that required clarification and improvement. The report recommended changes to the law of conspiracy. These were largely modelled on the *Criminal Law Act 1977*, which had been enacted in the United Kingdom following a comprehensive review of the common law offence of conspiracy by the Law Reform Commission of England and Wales.

Following the recommendations of the Hong Kong Law Reform Commission, the common law was changed by the enactment of the Crimes (Amendment) Ordinance 1996. The object of the exercise was—

(1) to codify the offence of conspiracy and place it in a statutory framework,
(2) to remove some of the obscure crimes which may lead to misunderstanding, and
(3) to improve on some of the less satisfactory and uncertain aspects in the law of conspiracy.

It was intended to achieve this object by creating a statutory offence of conspiracy to replace common law conspiracy and making provisions for matters relating to this change. The statutory conspiracy as defined by section 159A made it an offence only if there was an agreement to commit a crime. The new law decriminalised controversial offences such as conspiracy to commit a tort and conspiracy to corrupt public morals or to outrage public decency, but retained the offence of conspiracy to defraud. However, it did not decriminalise conduct, such as that committed in the present case, which was regarded as a criminal offence both before and after the coming into effect of the new law. Conduct that, if it were committed before 2 August 1996, would have been punishable as a common law conspiracy would also have been caught by the new statutory offence. The substitution of common law conspiracy (with the exception of conspiracy to defraud) by a statutory equivalent was, the Court found, clearly intended to produce a continuum.

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[7] In paragraph 3.43.

The transitional provision

Section 159E(1) did not simply declare that the offence of conspiracy at common law was abolished. It also provided that the abolition was subject to the provisions of that section. One immediately sees from section 159E(2) that the common law offence of conspiracy to defraud was not affected by it. The abolition was further subject to the transitional provision in section 159E(7). That subsection enabled two types of proceedings to be continued or commenced after the abolition. Those proceedings clearly related to common law conspiracies committed before 2 August 1996. However, as the Court found, this subsection did not apply to the present case. Nor was it applicable to common law conspiracies committed before the effective date, which were either not detected or for which no charge had yet been laid before that date. No other provision was made for the transition. The Court thought that, if the abolition was expressly subject to the transitional provision, it should not normally be necessary, as a matter of construction, to look beyond the provision to discover the scope of the abolition.

Section 159E(7) was also, the Court said, to be contrasted with section 159K, which was a transitional provision for the abolition of the common law offence of attempt. Section 159K reads as follows:

> (1) The offence of attempt at common law is abolished for all purposes not relating to acts done before the commencement of this Part.
>
> (2) Except as regards offences committed before the commencement of this Part, references in any enactment passed before this Part which fall to be construed as references to the offences of attempt at common law shall be construed as references to the offence under section 159G.

This transitional provision made it clear that offences of attempt committed before the effective date could still be prosecuted. Although the amendments to the offences of conspiracy and attempt at common law were contained in the same piece of legislation, the differences in their respective transitional provisions suggested that, unlike attempts, common law conspiracies committed before 2 August 1996 that were not covered by section 159E(7) could not be prosecuted after that date.

The Court suggested that the drafter may have blundered by overlooking this point and failing to make sufficient transitional provision to cover past offences that came to light after the effective date. However, without knowing exactly what exactly happened, the Court was not sure that this was an entirely fair criticism. Since Part XIIA was largely taken from the *Criminal Law Act 1977*, it would, the Court thought, be inconceivable that the drafter would simply have overlooked section 5(5) of the 1977 Act. Further, when the Hong Kong provisions were being drafted, the issue of making provision for the transition was clearly very much alive. As the Court noted, the drafter did see fit to include a transitional provision in section 159K for the offence of attempt that specifically extended to offences committed before the commencement of that section. One possible reason for not including a provision

similar to section 5(5) of the 1977 Act could have been that the drafter was concerned that there might be a danger that this would contravene the *Hong Kong Bill of Rights Ordinance* (Cap. 383). This is because section 5(5) of the 1977 Act had the effect of extending the new statutory offence retrospectively to certain types of conduct[8], committed before the operative date, that was not criminal before the Act came into operation. It would seem that the drafter, bearing this risk in mind, might have made a conscious decision not to include an equivalent of section 5(5) of the Act into the Hong Kong legislation. Also, the drafter might have come to the considered view that the Hong Kong provisions, in particular section 159E(1), would be sufficient to catch past conduct that was criminal but was not revealed until after the operative date.

Construction to be adopted

The Court thought that, in the absence of a clear and express transitional provision covering criminal conduct committed before the new law came into effect, section 159E(1) could be construed in two alternative ways. First, the offence of common law conspiracy was abolished for all purposes, and all conduct committed before 2 August 1996 could no longer be prosecuted. Second, the offence was abolished only insofar as it related to conduct committed after 2 August 1996, but conduct committed before that date could still be prosecuted. Arguably, neither construction is satisfactory, with the first one not giving effect to the intention of the Legislature and the second one not doing full justice to the language of the provisions. So which construction should the Court give in order to give effect to the "intention of the Legislature"?

Section 19 of the *Interpretation and General Clauses Ordinance* (Cap. 1) requires that an Ordinance should receive such a fair and large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit. Devlin LJ in *Gladstone v. Bower* [1960] QB 384 said[9]:

> The court would always like to allow the intention of a statute to override the defects in its wording, but its ability to do so is limited by the recognised canons of interpretation. The court may, for example, prefer an alternative construction which is less well fitted to the words but better fitted to the intention of the Act.

Mason and Wilson JJ in Cooper Brookes (*Wollongong Pty Ltd v. Federal Commissioner of Taxation* (1980) 147 CLR 297 at 320 took a similar view:

> But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.

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[8] E.g. conspiracy to commit an impossible crime.

[9] At 395.

In the circumstances of this case, the Court had no doubt that the second alternative fitted the intention of the Legislature better and would best ensure the attainment of the object of the legislation. Furthermore, a most undesirable result would be avoided.

According to the Court, the intention of the Legislature when *the Crimes (Amendment) Ordinance 1996* was enacted was quite clear. The Court was satisfied that it was never intended to give a general pardon to offenders who had committed common law conspiracies before the law was changed. No clear and express transitional provision had been enacted to deal with such offenders. If section 159E had failed to give effect to the true legislative intention as a result of the inadvertence of the drafter, what was omitted would be a provision to the effect that conduct committed before the effective date, which amounted to a conspiracy at common law, would continue to be punishable after the effective date. Although the statute was a penal one, the Court held that no injustice would be done to such offenders if they were to be prosecuted for the criminal conduct that they had committed and for which they would have been held liable had that conduct been discovered and made the subject of a charge before 2 August 1996. On the other hand, the Court felt that it would be a grave injustice to allow such offenders to escape the criminal justice system. The Court also doubted whether an amendment to section 159(7) would have the desired effect of rectifying the position in view of the provision in the *Hong Kong Bill of Rights Ordinance* (Cap. 383) against retrospective incrimination[10]. In the circumstances, the Court felt that it would not be going too far in adopting a remedial construction in the interpretation of section 159E. This was amply justified in the present case in order to correct the drafting error and give effect to the intention of the Legislature.

Grealis v. Director of Public Prosecutions—Irish Supreme Court (31 May 2001)[11]

This was a case involving the prosecution of common law offences that, since the dates on which the offences were alleged to have been committed, had been replaced by corresponding statutory offences.

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[10] See Article 12 of the Ordinance. This reads as follows:

Article 12—No retrospective criminal offences or penalties

(i) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(ii) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

[11] At the time of publication, this case had not been reported. References in the note to "Acts" are references to Acts enacted by the Oireachtas (Irish Parliament).

In earlier proceedings before the High Court, the applicant had sought the prohibition of any further prosecution of charges of assault contrary to common law and unlawful assault contrary to section 47 of the *Offences Against the Person Act 1861*. The summonses, dated September 1997, alleged that the offences were committed in May and the dates for hearing were October. The *Non-Fatal Offences Against the Person Act 1997* came into operation in August that year and abolished the common law offences of assault and assault occasioning actual bodily harm. It was contended on behalf of the applicant that there was no saving provision in the 1997 Act for offences charged after August 1997 and that therefore the offences with which he was charged could not be prosecuted. It was submitted that, while the applicant had been charged on one summons with assault contrary to section 47 of the 1861 Act, that offence was not in fact an excluded statutory offence but a common law offence.

After the charges were laid, the Irish Government appears to have belatedly recognised that there was a problem. Whereas section 21 of the *Interpretation Act, 1937*, saved pending or future criminal proceedings arising under a repealed enactment, the 1997 Act contained no corresponding provision for common law offences that were abolished by statute. The Government therefore introduced into the Oireachtas[12] a Bill that purported to rectify the situation. The Bill was subsequently enacted as the *Interpretation (Amendment) Act 1997*. Section 1 of the Act substantially replicated the provisions of section 21 of the 1937 Act, in essence treating abolished common law offences like repealed enactments. Section 1 reads as follows:

> (1) Where an Act of the Oireachtas abolishes, abrogates or otherwise repeals an offence which is an offence at common law, then unless the contrary intention appears, such abolition, abrogation or repeal shall not—
>
> (a) affect the previous operation of the law in relation to the offence so abolished, abrogated or repealed or any other offence or anything duly done or suffered thereunder,
>
> (b) affect any penalty, forfeiture or punishment incurred in respect of any such offence so abolished, abrogated or repealed or any other offence which was committed before such abolition, abrogation or repeal, or
>
> (c) prejudice or affect any proceedings pending at the time of such abolition, abrogation or repeal in respect of any such offence or any other offence.
>
> (2) Where an Act of the Oireachtas abolishes, abrogates or otherwise repeals an offence which is an offence at common law then, unless the contrary intention appears, any proceedings in respect of any such offence or any other offence committed before such abolition, abrogation or repeal of any such offence at common law may be instituted, continued or enforced and any penalty, forfeiture or

[12] The Irish Parliament.

> punishment in respect of any such offence at common law or any other offence may be imposed and carried out as if such offence at common law had not been abolished, abrogated or otherwise repealed.
>
> (3) This section applies to an offence which is an offence at common law, abolished, abrogated or otherwise repealed before or after the passing of this Act.
>
> (4) If, because of any or all of its provisions, this section would, but for the provisions of this subsection, conflict with the constitutional rights of any person, the provisions of this section shall be subject to such limitations as are necessary to secure that they do not so conflict, but shall otherwise be of full force and effect.

The savings provision contained in the *Interpretation (Amendment) Act 1997* thus purported to allow a prosecution for the common law offence of common assault despite its abolition by the *Non-Fatal Offences Against the Person Act 1997*. Clearly section 21 of the *Interpretation Act 1937* did not apply to common assault, because that section applied only to repealed enactments. The Director of Public Prosecutions contended that the *Interpretation (Amendment) Act 1997* was merely declaratory and did not create new law.

In the High Court proceedings, the Court had held as follows:

- The offence of assault occasioning bodily harm was a statutory offence and the offence of assault contrary to section 47 of the 1861 Act did not come within the provisions of section 28 of the 1997 Act. However the offence of assault contrary to section 47 was by virtue of section 31 of that Act, abolished from August 1997;
- The saving provision in section 21 of the *Interpretation Act 1937* applied only to statutory offences. When the 1997 Act came into force in August 1997, there were no saving provisions for the common law offences abolished by section 28 of that Act. However, the same considerations did not apply for assault contrary to section 47 of the 1861 Act. Despite the repeal of section 47 by section 31 of the 1997 Act, the provisions of the *Interpretation Act 1937* enabled the continuance of the prosecution of the plaintiff for assault contrary to section 47 of the 1861 Act;
- On its face, the saving provision of the *Interpretation (Amendment) Act 1997* allowed a prosecution for common assault after the commencement of *the Non-Fatal Offences Against the Person Act 1997*, provided the alleged offence was committed before that date. Given that there was no saving provision for the offence of common assault that was abolished by the *Non-Fatal Offences Against the Person Act 1997*, and that section 21 of the *Interpretation Act 1937* did not apply to common assault, the *Interpretation (Amendment) Act 1997* purported to create new law. It was not merely declaratory;
- While there was a presumption that the *Interpretation (Amendment) Act 1997* was constitutional, it purported to allow interference in a judicial process in being, to permit inequality before the law, to divest the Legislature's authority in favour of the courts, and to allow judges of the District Court to determine its constitutionality;
- The charges of common assault could not be prosecuted. However, section 21 of the

> *Interpretation Act 1937* enabled the continuance of the prosecution for assault contrary to section 47 of the 1861 Act.

On an appeal by the Deputy Director of Prosecutions and the Attorney General from the decision of the High Court, the Supreme Court[13] upheld the High Court's decision with one exception.

According to Chief Justice Keane, the assault in question was a common law offence (because it was expressly so provided in the *Non-Fatal Offences Against the Person Act 1997*). He found that that Act had abolished the common law offence of assault and that that offence had therefore ceased to exist as of 19 August 1997 (the date on which that Act commenced). He further found that there was no express transitional provision in the *Non-Fatal Offences Against the Person Act 1997* providing for proceedings after the offence was abolished. Nor were there any words in that Act from which an intent to establish a transitional provision could be inferred.

The Chief Justice thought is it was not appropriate for the Court to seek or make a determination that, had the Oireachtas thought about it, they would have introduced transitional provisions[14] providing for the time of transition. This was because the functions of the three organs of government are separate and so one should not interfere with another.

The common law position with respect to repealed enactments prior to the enactment of section 21 of the *Interpretation Act 1937* (and the earlier section corresponding to that section, as described by Rolf B. in *R. v. Swan* 4 Cox C.C. 108 (1849), was, by analogy, relevant to the abolition of common law offences by statute. In that case Rolf B had said:

> I think it perfectly clear that, when a statute is repealed simpliciter, you cannot afterwards proceed against a person for anything done under it. … I find a vast number of statutes, constituting certain offences, were by them (sic) repealed, and new acts substituted; in all of them I see that the Acts are repealed from a certain day except as to offences committed before the repeal, and which are to be dealt with as though the repeal had not taken place.… It might be by mistake that the new Act did not contain such a provision as I have mentioned, but it very positively repeals all that has gone before, and it is much safer to adhere to what the Legislature enacts than to speculate on what it intended. The defendant must be acquitted.

In the absence of an effective savings or transitional provision in the *Non-Fatal Offences Against the Person Act 1997*, or any other statute, the Chief Justice held that the common law offence of assault ceased to exist after 19 August 1997 with the result that the applicant could

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[13] Judgments were given by Keane CJ, Denham and Hardiman JJ; Murphy J agreed with Hardiman J; Murray J agreed with Denham J.

[14] More accurately "savings provisions" in this context.

no longer be charged with the offence. The Chief Justice further held that it was a fundamental tenet of law (consistent with the Irish Constitution) that, unless special provision to the contrary is made by statute, after the expiration of a law no penalty or punishment should be inflicted for a violation of that law, even though it may have been committed while the law was in force. He observed that, in general, retrospective offences were anathema to the rule of law and due process [15].

As regards the validity and effect of the *Interpretation (Amendment) Act 1997*, the Supreme Court held the Act to be valid constitutionally, but only prospectively. The Court therefore allowed the appeal of the Attorney General against the finding of the Irish High Court that that Act was unconstitutional in so far as it purported to apply prospectively.

The Court dismissed the appeal of the Director of Public Prosecutions against the order of the High Court granting prohibition of the prosecutions for assault.

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[15] For the reasons given by the Court of Final Appeal in *Chan*, I would question the statement that the offences concerned were 'retrospective'.

A guide for effective legislative drafting instructions[1]

Office of the Queensland Parliamentary Counsel

Introduction

Purpose of guide	1. This guide is prepared by the Office of the Queensland Parliamentary Counsel ("OQPC") to help those who prepare instructions for the drafting of legislation in Queensland.
Effective drafting instructions and instructors	2. This guide sets out the elements that, from experience, constitute effective drafting instructions for legislation and the characteristics of an effective instructing officer.
Guide only	3. This document is a guide only. It draws together issues that are commonly encountered in the drafting process.
Other relevant documents	4. This guide refers to other documents relevant to drafting instructions and the drafting process. For example - • chapter 7 of the Cabinet Handbook deals with various aspects of the Government' s legislative program and the development of legislation • the *Acts Interpretation Act 1954*, *Statutory Instruments Act 1992* and *Legislative Standards Act 1992* impact on the way legislation is drafted. • Also, chapter 5 of the Executive Council Handbook touches on the consideration by the Executive Council of proclamations and subordinate legislation. Accordingly, this guide needs to be read with other documents.

[1] After the Office of the Queensland Parliamentary Counsel distributed the Guide, the Office used it and other documents to produce a booklet called 'The Queensland Legislation Handbook' as part of series of booklets called 'Governing Queensland'. The Queensland Legislation Handbook can be accessed in full from the Office's home page at: http://www.legislation.qld.gov.au/OQPChome.htm

Other Australian jurisdictions have produced publications similar the to the Guide and have also held seminars for instructing officers.

Approach for identifying elements and characteristics	5. To identify the elements of effective drafting instructions and the characteristics of effective instructing officers, the approach taken in this guide is to give an explanation about— • the role of drafters (see items 9-11) • the role of instructing officers (see items 12-32) • effective drafting instructions (see items 33-59).
Benefits of preparing effective drafting instructions	6. Initially, preparing effective drafting instructions may take an instructing officer extra time and effort. However, experience has shown there are direct benefits for the instructing department that more than justify the extra time and effort. They include— • a complete first draft can be prepared more quickly • the number of revising drafts is minimised • fewer issues arise in the drafting process needing resolution • further instructions are likely to be more timely and focus is maintained • legislation of a high standard is completed in the shortest possible time-frame the Cabinet Authority to Prepare a Bill will be more comprehensive.
Whole of Government benefit	7. Effective drafting instructions allow drafting resources to be used more efficiently in meeting the Government's overall legislative program. As demand for legislation increases, effective drafting instructions become more critical.
Meaning of "department"	8. When the term "department" is used in this guide, it means not only a department but also a Government agency.

Role of OQPC

Statutory functions

9. The Office of the Queensland Parliamentary Counsel is established by the *Legislative Standards Act 1992* and given statutory functions. In particular, OPC drafts Bills, amendments of Bills and subordinate legislation.

The most common types of subordinate legislation are—

- regulations, and
- proclamations commencing Acts.

Other types of subordinate legislation are mentioned in the *Statutory Instruments Act 1992*, section 9.

Role of drafters

Meaning of "department"

10. The drafter translates the policy in the drafting instructions into a legislative form. However, the drafter is not a mere scribe. The drafting process requires the drafter—

- to understand the drafting instructions and the policy
- to consider the legislative framework in which the legislation will operate
- to provide advice about alternative ways of achieving policy objectives and the application of fundamental legislative principles (see attachment 1)
- to provide advice about matters likely to be raised by the Scrutiny of Legislation Committee (see chapter 7.5 of the Cabinet Handbook)
- to draft the legislation in accordance with current legislative drafting practice
- to discuss revisions with the instructing officer to make changes and finalise the legislation.

The primary responsibility of the drafter is to ensure the proposed legislation achieves the policy in a legally effective way.

Team project

11. The drafter does not work in isolation. Drafting is a

	team project that involves OPC officers, the instructing officer and sometimes other officers from the instructing department. The OPC officers include— • a drafter who has primary responsibility for drafting the legislation (commonly called the "DI") • another drafter who performs a back-up and quality assurance role (commonly called the "D2") a legislation officer who performs a support and editorial role (commonly called the "LO").

Role of instructing officer

Main aspects of role	12. From the perspective of a drafter, the main aspects of the instructing officer' s role in the drafting process include— • developing comprehensive policy, • preparing comprehensive drafting instructions explaining the drafting instructions to the drafter, • carefully examining drafts of the legislation, • providing constructive comments on drafts of the legislation • consulting on the draft legislation • preparing explanatory notes for the legislation[2]
Understanding of AIA, SIA and LSA	13. An effective instructing officer does not need to be a lawyer but has some understanding of *the Acts Interpretation Act 1954*, *the Statutory Instruments Act 1992* and the *Legislative Standards Act 1992* because— • the *Acts Interpretation Act 1954* contains provisions that apply generally to all legislation as aids in the interpretation of legislation resulting in clearer drafting, including, for example, definitions of commonly used expressions

[2] In many jurisdictions, such as New Zealand, New South Wales, Victoria and Hong Kong, the explanatory memorandum is prepared by the legislative drafter who prepared the Bill.

	• the *Statutory Instruments Act 1992* brings together and clarifies the law about statutory instruments,[3] particularly in relation to the power to make statutory instruments • the *Legislative Standards Act 1992* establishes OPC, states its functions and provides for the fundamental legislative principles.
Understanding the role of Scrutiny of Legislation Committee	14. An effective instructing officer is familiar with— • the role of the Scrutiny of Legislation Committee of the Legislative Assembly, established by the *Parliamentary Committees Act 1995* • the publications of the committee, in particular its alert digests, policies and reports.[4]

Developing comprehensive policy

Instructing officer translates policy	15. An effective instructing officer translates political and administrative policy into legislative policy, expressed as drafting instructions. The development of comprehensive legislative policy is necessary to achieve workable legislation.
Considerations for instructing officer	16. An effective instructing officer is familiar with— • political and administrative considerations, • the legislative context, • the things that may or should be dealt with in an Act or subordinate legislation, and • the things that may or should be left to administration.

Preparing comprehensive drafting instructions

Content of written drafting instructions	17. An effective instructing officer prepares written drafting instructions consisting of—

[3] *Statutory Instruments Act 1992*, section 7. It includes subordinate legislation.

[4] See the OPQC website, which is—*www.parliament.qld.gov.au/committees/scrutiny.htm*.

- the overall purpose, objective or philosophy behind the legislative proposal,
- main or basic concepts (who and what are we talking about) that are clear, settled and efficient,
- main rules or objectives (what is the main or basic thing we are trying to do) that are complete and settled,
- the other rules or objectives (what other things do we need to do to make the main or basic thing work),
- the way the rules or objectives work together (are the things that we are doing consistent and compatible with each other), and
- the relationship between the legislative proposal and existing legislative provisions or other law.

In addition, effective drafting instructions for a Bill would identify whether any of the rules or objectives should be implemented in subordinate legislation.

All aspects to be covered

18. Effective drafting instructions identify the persons or things to whom the legislation is to apply and cover all aspects of the scheme from the big picture to matters of relatively minor detail. The drafter should not have to make something up to fill in a policy gap.

Explaining the drafting instructions to the drafter

What the instructing officer should be able to do

19. Valuable time and drafting resources may be wasted because an instructing officer does not have sufficient understanding or seniority to give instructions. An effective instructing officer is able—

- to explain the aims of a legislative proposal to the drafter
- to tell the drafter all he or she needs to know to be able to draft legally effective legislation that implements the policy
- to make decisions on issues arising during drafting.

An effective instructing officer

20. If an instructing officer does not understand the

understands their own instructions	instructions, it is unlikely the drafter will understand them. If an effective instructing officer is asked to include things in the instructions that he or she does not understand, the officer should do whatever is necessary to obtain a proper understanding of the instructions before sending them to OPC.

Carefully examining drafts of legislation

Considering each draft is essential	21. It is essential for an instructing officer to read and check draft legislation to ensure it gives effect to drafting instructions and to point out any problems.
Steps in considering drafts	22. On receiving a draft, an effective instructing officer— • reads the draft carefully to make sure he or she understands it. (If the officer does not understand it or is unsure about an aspect, he or she asks the drafter.) • test runs the draft against scenarios to make sure it gives effect to policy and does not have any unintended consequences • checks the draft for consistency to make sure it is internally consistent and, if appropriate, consistent with related legislation[5] • checks the authority to draft the legislation to ensure all matters included in the draft are covered by the authority (for example, Cabinet Authority to Prepare) and all matters required by the authority to be included in the legislation are included in the draft.
Problems with authority to draft	23. If the current authority to draft does not cover the proposed legislation, further authority needs to be obtained. For example, further authority will be needed if a draft takes a different turn from that originally envisaged in the drafting instructions because—

[5] The use of a clearer style or gender-neutral language in amending legislation does not change the meaning of the language used in existing provisions that are not being amended—see *Acts Interpretation Act 1954*, section 14C (Changes of drafting practice not to affect meaning).

- a problem is encountered with the original concept
- an additional issue needs to be dealt with.

Providing constructive comments on drafts of legislation

Constructive comments	24. An instructing officer's role includes giving constructive comments on each draft. Comments can be given either at a meeting or by letter, fax, e-mail or phone. However, comments about significant issues need to be confirmed in writing. An effective instructing officer provides comments on all matters the instructing officer wants the drafter to consider. Comments should clearly relate to identifiable relevant provisions. The drafter will assume the instructing officer is satisfied with the parts of the draft on which the instructing officer does not comment.
Explanation of problems	25. If an effective instructing officer thinks a particular provision does not work or does not give effect to the policy, the officer identifies the problem. It is extremely important to fully explain the problem, including an example demonstrating the problem. It is inappropriate to attempt to redraft the provision or return the draft showing suggested changes without the explanation. An effective instructing officer makes the comments easy to follow and understand.

Consulting on draft legislation

Other departments may be involved	26. Drafting instructions for legislation usually come from a single department. However, implementing the instructions may trespass on an area for which another department has responsibility.
Consulting with other Government bodies	27. An effective instructing officer consults with other relevant departments on draft legislation if— • the legislation makes consequential amendments of the other department's legislation, or • the authority to draft expressly requires the consultation, or • the legislation deals with matters in the

	circumstances outlined in chapter 6.2 of the Cabinet Handbook.
Consulting with others	28. Chapter 6 of the Cabinet Handbook deals with consultation with persons or organisations external to the Government (including employers, unions, community groups and special interest groups) as well as departments.
How OPC can help with consultation drafts	29. OPC can insert watermarks into the draft indicating it is, for example, a "working draft" or "consultation draft". Timing for consultation drafts should be discussed at an early stage of the drafting process.
Removal of front page	30. The front page of a Bill or subordinate legislation, containing the list of internal Government contacts and instructions, must be removed before it is circulated outside the Government. Also, the front page should be removed before a draft is attached to a Cabinet Submission. In both cases, the draft for circulation should not contain the drafter's notes and queries directed to the instructing officer.

Preparing explanatory notes for legislation

Necessity for explanatory notes	31. Under the *Legislative Standards Act 1992*, section 22, the following must be accompanied by an explanatory note— • Government Bills presented to the Legislative Assembly • significant subordinate legislation tabled in the Legislative Assembly.
Requirements and circulation	32. Also, sections 23 and 24 of the Act set out requirements for the contents of explanatory notes for Bills and subordinate legislation respectively. Chapters 7.3 and 7.4 of the Cabinet Handbook contain provisions about their preparation and circulation.

Preparing explanatory notes

33. Under chapter 2.4 of the Cabinet Handbook, Cabinet legislation and liaison officers are required to ensure explanatory notes for subordinate legislation are prepared in accordance with the requirements of the *Legislative Standards Act 1992* and the handbook. However, generally, instructing officers prepare the explanatory notes because they have the necessary knowledge about the legislation.

It is a matter for the instructing officer to decide when to start preparing the explanatory notes to ensure the notes in final form are ready when required. Explanatory notes are designed to explain the legislation and not merely repeat or paraphrase its provisions. An effective instructing officer exercises considerable care in preparing explanatory notes because they may be used by courts to interpret the legislation—see section 14B of *the Acts Interpretation Act 1954* (Use of extrinsic material in interpretation).

OPC is not involved

34. Drafters do not prepare explanatory notes or Ministers' second reading speeches for Bills.

Effective drafting instructions

Written instructions

35. Initial drafting instructions must be given in writing. However, oral instructions may be given in exceptional circumstances.

Complete, accurate and comprehensive

36. Effective drafting instructions are complete, accurate and comprehensive. It is important they state—

- what has to be done
- why it has to be done
- by what time it has to be done.

Effective drafting instructions include proposals that have been worked out. In some cases, time constraints may mean drafting will have to start while some aspects are still being worked out. If this happens, effective instructions would clearly identify matters still undergoing consideration or subject to change.

Plain language, narrative form	37. Effective drafting instructions are written in plain language and in narrative form.
Words used	38. Effective drafting instructions need to avoid specialised or technical jargon, unless the jargon is necessary. If it is necessary, jargon needs to be explained. Also, words need to be used consistently throughout the instructions and variation for the sake of elegance needs to be avoided. If the legislation is subordinate legislation or it forms part of a related scheme, the existing terms in the authorising Act or scheme need to be used.
Departmental drafts not required	39. OPC does not require, nor does it encourage, departments to provide drafting instructions by way of draft legislation (a "departmental draft").
Problems with Departmental drafts	40.A problem with a departmental draft is that the drafter may not fully appreciate the precise nature and extent of the legislative proposal because the drafter may interpret the words used in the draft in a way different to that intended by the department. Other problems arise if a department prepares a departmental draft and then agrees on its terms with relevant stakeholders. For example— • a provision of a departmental draft may breach a fundamental legislative principle • a provision may be prepared in ignorance of other pending legislation or whole of Government policy • one provision of the draft may contradict another or be inconsistent with the authorising Act.
When departmental draft inappropriate	41. A departmental draft is particularly inappropriate in the case of minor amendments to existing legislation or drafts based on well-established precedents (for example, commencement proclamations), as opposed to a marked up copy of the existing legislation.
Sometimes departmental draft	42. A good departmental draft can sometimes be helpful

may be useful	to the drafter, if accompanied by drafting instructions in narrative form (not being merely a paraphrase of the draft). For example, in the case of amendments to existing legislation, a copy of the legislation marked with the proposed changes accompanying the narrative drafting instructions may be helpful. However, the submission of a departmental draft is not a substitute for proper instructions. A delay sending instructions simply in order to produce or polish a departmental draft is unjustifiable. If time is short, the submission of good narrative instructions is more likely to expedite the drafting process than a departmental draft.
Suggested format	43. While there is no single form that drafting instructions must take, it is helpful if they are dated and set out in numbered paragraphs on numbered pages. This makes it easier to refer to, and discuss, particular issues.
Details of instructing officer	44. It is helpful if identifying information about the instructing officer is stated clearly in drafting instructions at the start or end of the instructions. The name of the instructing officer, and the officer's position title, address, contact telephone number, fax number and e-mail address should be stated. Also, it is helpful for the drafter to know of the instructing officer's planned absences to prioritise the drafter's workload. If the instructing officer is a part-time officer, it is highly desirable to nominate an alternate instructing officer and state relevant details.
Authority to draft	45. The authority to draft a Bill should be stated in the drafting instructions. For subordinate legislation, the authority is ordinarily a decision of Cabinet or the relevant Minister or chief executive.[6]

[6] Chapter 7 of the Cabinet Handbook deals with the Government's legislative program. More specifically, matters covered by the chapter include the formulation of the program, guidelines for programming proposed Bills, controlling the volume of legislation and monitoring the program.

Legislative priority	46. Drafting instructions should indicate the priority for the legislation and, in particular, when the legislation is required.
Principal objectives	47. The principal objectives to be achieved by the legislation should be stated, that is, what has to be done and why it has to be done. For this purpose, it may be necessary to attach background papers. Also, it may be helpful to give examples of the problems the legislation is intended to overcome.
Legislative environment	48. Effective drafting instructions indicate the provisions of the amended or other legislation that need to be understood and the relationship between the proposed legislation and the specific provisions of the existing legislation.
Related matters	49. If there are any other legislative proposals that relate to the legislation, these should be mentioned whether or not they are already before the Parliament.
Binding on State	50. For new Acts, effective drafting instructions state whether the Act is to bind the State.[7]
Fundamental legislative principles	51. Effective drafting instructions should address whether the proposed legislation is consistent with fundamental legislative principles—see attachment 1.
Political sensitivity	52. Effective drafting instructions will mention any aspect of the legislation that is politically sensitive.
Legal opinions and case law	53. Copies of relevant legal opinions should be attached to the drafting instructions, including opinions from the

[7] See the *Acts Interpretation Act 1954*, section 13 (Future Acts when binding on the Crown).

	solicitor-general, Crown solicitor or, if native title is an issue, the Native Title Unit of the Department of the Premier and Cabinet, and private lawyers. The instructions should also refer to any known relevant court decisions.
Administrative or judicial review	54. If the legislation involves any decision of an administrative character, the question whether the decision is to be reviewable, and if so by whom, should be addressed.[8]
Commencement	55. Effective drafting instructions state when the legislation is to commence.[9]
Main options	56. The main options for commencement dates for Bills are— • on royal assent (by the Governor) • on a stated future or past day • on a day to be fixed by proclamation • on the commencement of another Act. The main options for commencement dates for subordinate legislation are— • on notification in the Queensland Government Gazette • on a stated future or past day[10] • on the commencement of the authorising Act or other legislation. Effective drafting instructions include all matters affecting the legislation's commencement.
Consequential amendments	57. The impact of the legislation on existing legislation and other laws should be included in the instructions. The

[8] Whether legislation makes administrative power subject to appropriate review is a fundamental legislative principle—see *Legislative Standards Act 1992*, section 4(3)(a).

[9] For general provisions about the commencement of Acts, see the *Interpretation Act 1954*, Part 5, and for statutory instruments, see the *Statutory Instruments Act 1992*, part 4, section 14 and division 3, subdivision 3.

[10] However, for subordinate legislation, only a beneficial provision as defined in the *Statutory Instruments Act 1992*, section 34, may be given retrospective commencement.

	instructions should identify all provisions (both in legislation to be amended and in other legislation) that need to be amended as a consequence of the proposed legislation. Searches of electronic current reprints of Queensland legislation are a useful way to find the provisions, but the results are not infallible. www.legislation.qld.gov.au/
Regulation-making powers under authorising Act	58. The extent of intended regulations should be included in the instructions so that sufficient regulation-making power is included in the Bill.[11] Generally, matters of detail and matters likely to be changed frequently are dealt with by regulation (for example, fees).
Penalties for offences	59. If the legislation is to create offences, the penalties for the offences need to be included in the instructions. The penalties must be internally consistent and consistent with Government policy and other legislation. It should be remembered that it may not be necessary to create an offence if other legislation already covers the intended offence. In particular, the offences in the Criminal Code should not be replicated.
Savings and transitional provisions	60. An effective instructing officer considers all transitional and savings issues resulting from a change in the law. For example, the following need to be included in the instructions— • the application of the new legislation to cases that arose before the change • the requirement for a transitional period during which the effect of the new law needs to be modified, or special provisions are required • the extent to which anything done under the old legislation may have effect under the new legislation.

[11] Part 4, division 3 of the Statutory Instruments Act 1992 contains provisions about making statutory instruments.

Retrospectivity	61. If legislation is to include a provision that has retrospective effect, an effective drafting instructor must fully explain the reasons for, and the specific context of, the retrospectivity. For example, if an attempt is being made to retrospectively apply any aspect of the criminal law, the application will need to be expressed, fully justified and in no case retrospectively make an act or omission an offence that was not an offence when done or made.
Consultations	62. If the legislation affects other departments or their legislation, the instructions should include— • a list of the departments • an indication of the extent to which the departments have been consulted • an indication of any consultations that will take place in the future.
Other matters	63. Other matters that may need to be addressed include the matters dealt with in chapter 7.2 of the Cabinet Handbook about the development of a Bill, including consistency with Commonwealth legislation and Australia's obligations under international treaties. There may be other matters that require consideration, such as sunset clauses.

Attachment 1—Fundamental Legislative Principles

Under the *Legislative Standards Act 1992*, section 7, OPC's functions include advising on the application of fundamental legislative principles. The Cabinet Handbook requires OPC to be satisfied proposed subordinate legislation has sufficient regard to the principles before certifying it at the end of the drafting process.

The Scrutiny of Legislation Committee is required to report to the Legislative Assembly on the application of the principles to Bills and subordinate legislation.

Fundamental legislative principles are an evolving set of principles for a parliamentary democracy and not a set of absolute rules. The *Legislative Standards Act 1992*, section 4 should be carefully considered. It states as follows:

Meaning of "fundamental legislative principles"

4. (1) For the purposes of this Act, "fundamental legislative principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to—

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—

(a) is within the power that, under an Act or subordinate legislation (the "authorising law"), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and
(c) contains only matter appropriate to subordinate legislation; and
(d) amends statutory instruments only; and
(e) allows the subdelegation of a power delegated by an Act only—
(i) in appropriate cases and to appropriate persons; and
(ii) if authorised by an Act.

Attachment 2—Checklist for Effective Drafting Instructions

Are the instructions—	Yes	/No
Written (item 33 of the guide)	☐	☐
Complete, accurate and comprehensive (item 34)	☐	☐
In plain language (note: technical words and jargon should be avoided if possible) (items 35 and 36)	☐	☐
In narrative form (note: departmental drafts generally not appropriate) (items 35-39)	☐	☐
In an effective format (item 40)	☐	☐
Understood by the instructing officer (items 18 and 19)	☐	☐
Do the instructions contain details of—		
The instructing officer (item 41)	☐	☐
The principal and ancillary objectives (items 16 and 44)	☐	☐
The appropriate policy authority (item 42)	☐	☐
The legislative environment (item 45)	☐	☐
The legislative priority (item 43)	☐	☐
Political sensitivity (item 49)	☐	☐
Consultations (Cabinet Handbook, chapter 6 and item 58)	☐	☐
Commencement (item 52)	☐	☐
Consequential amendments (item 53)	☐	☐

Legal opinions and known relevant court decisions (item 50)	☐	☐

Do the instructions deal with the following?

Fundamental legislative principles (item 48 and attachment I)	☐	☐
Penalties for offences (item 55)	☐	☐
Consultation draft requirement (items 27 and 28)	☐	☐
Regulation-making powers under an Act (item 54)	☐	☐
Savings and transitional provisions (item 56)	☐	☐
Retrospectivity (item 57)	☐	☐
Binding on the State (item 47)	☐	☐
Administrative or judicial review (item 51)	☐	☐

Obituary—Hilton Mcintosh

Mary Dawson[1] and Lionel Levert[2]

Many current and past CALC members have met Hilton McIntosh or have heard or read about him, given his important contribution to the legislative drafting community. It is with great sadness that the Canadian legislative drafting community, and especially his former colleagues in the Department of Justice of Canada, learned on 27 August 2001 that Hilton had passed away the previous evening.

A very well-attended ceremony of celebration and remembrance, presided over by Hilton's good friend The Right Honourable Ramon Hnatyshyn, former Governor General of Canada, was held in Ottawa on 31 August.

Eulogies were given by many of Hilton's friends. One of the eulogies was given by Mary Dawson, a colleague and friend of Hilton's. The following is an excerpt from her eulogy:

> Hilton McIntosh joined the Department of Justice of Canada in 1956 as a legislative drafter and left 30 years later, in 1986, as Assistant Deputy Minister, Legislative Services. In 1972, he became the first head of a then new and expanding unit that dealt with the regulations, and he remained in that position until he was appointed Assistant Deputy Minister for Legislative Programming in 1976.
>
> Around that time, the Legislative Programming Branch of the Department was reorganised and Hilton was joined by Fred Gibson as Chief Legislative Counsel and Gérard Bertrand as Associate Chief Legislative Counsel. These three formed the first management triumvirate for the legislation area. Mary Dawson became part of that triumvirate in 1980 when Fred Gibson left the Branch.
>
> Hilton retired from the Department of Justice of Canada in 1986 and went on to teach the legislative drafting course at the University of Ottawa. He was a natural for this, of course, not only because he was a great teacher but also because he had given individual courses at the University of Ottawa in related areas for many years before that.
>
> Those are the dry facts and statistics of Hilton's career at Justice Canada. Beyond these, as a person, Hilton had the most remarkable traits and talents. He was a friend to all who knew him, always cheerful and up-beat, and his sense of humour was never far off.

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[1] Associate Deputy Minister, Department of Justice of Canada.

[2] Special Advisor—Legislative Drafting, The International Co-operation Group, Department of Justice of Canada.

Hilton was always open to all members of the Department at any level and had time for anyone who sought him out. He had no prejudice of status and was always inclusive of everyone. If you met him on the street, he would always stop for a chat.

As we all know, Hilton was not all law and seriousness. It was amazing how he would uncover and remember the particular interests of those around him. When he chatted with you, you always had the sense that there was no one else in the world he would rather be chatting with.

He will always be remembered as a real gentleman.

New Books

Modern Legal Drafting—A Guide to Using Clearer Language[1]

Authors: Peter Butt and Richard Castle
Publisher: Cambridge University Press, The Edinburgh Building, Cambridge, CB2 2RU, England.
ISBN: 0 521 80217 2

This clearly structured and well-referenced book shows how and why traditional legal language has developed some of the peculiar characteristics that sometimes make legal documents inaccessible to their end users. It examines recent reforms in the United Kingdom, Australia and North America, and provides a critical examination of case law and the rules of interpretation. The book also covers practical issues. Detailed case studies show how obtuse words and phrases can be reformulated or done without. Particularly useful is the step-by-step guide to drafting in the modern style, using examples drawn from four kinds of common legal documents. These are—

- leases,
- company constitutions,
- wills, and
- conveyances.

Readers are given clear instructions on how to make their writing clearer and their legal documents more useable by clients and colleagues. The book will benefit lawyers, law students and others who have to write documents that are designed to have legal effect.

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[1] A review of this book, prepared by Daniel Lovric, will appear in the next CALC Newsletter.

Peter Butt, who teaches law at the University of Sydney in Australia, is currently the president of Clarity International. He was a founding director of the Centre for Plain Legal Language at that University and is the author of many books and articles on land law and conveyancing.

Richard Castle is an English solicitor who is currently working in New Zealand. He has written a number of books, including Barnsley's Land Options (3rd edition, 1998) and Rent Review Manual (with David Clarke, 1996).

Understanding common law legislation

Author: Francis Bennion
Publisher: Oxford University Press, Great Clarendon Street, Oxford, OX2 6DP, England.
ISBN: 0 19 924777 3

The book distils and updates the author's many published writings on statute law and judicial interpretation. Many countries' systems of law are based on the English common law. A feature of these systems is that most of the law now consists of statutes. Those statutes are interpreted according to a uniform system of rules, presumptions, principles and canons that common law judges have developed over several centuries. Those statutes are sometimes referred to as common law' statutes. The book deals with those statutes and the methods by which judges interpret them.

In particular, the book explains the system of interpretation common to British, Commonwealth and American legislation under the common law. It also shows how the traditional method of judicial interpretation interlocks with the UK *Human Rights Act 1998* and describes for legal practitioners and law students the way in which British, Commonwealth and American legislation is interpreted.

Legislative drafting vacancies

Norfolk Island

The Norfolk Island Administration is seeking to employ two legislative counsel on short term contracts.

One position is for 3 to 4 months. The Administration has a fairly urgent need to recruit someone on a short-term basis to continue its current legislative drafting program. If they can find somebody quickly, there would be an opportunity for a short hand-over period. However, there is apparently support from the staff of the Legal Unit and the CEO.

The Administration has only one position for a legislative counsel and so any person appointed would need to have a reasonable level of experience. As well as salary, furnished accommodation would be provided with a rental subsidy, airfare costs and some assistance with any excess baggage costs involved in the relocation.

The second position is for 6 months. The Administration also wants to recruit another legislative counsel to work in the Legal Unit on a specific task. It has recently completed a set of land-use initiatives, which it wants to be implemented by legislation.

Further information can be obtained from Liz Davis of the Norfolk Island Administration. Her e-mail address is Liz Davis ldavis@admin.gov.nf. However, she can also be contacted by telephone. Her numbers are 67 23 22001 (office hours) or 67 23 23122 (after office hours).

Irian Jaya

CALC has received a request from the British Council in Indonesia, on behalf of the British Embassy, for assistance in recruiting a consultant to support the drafting of special autonomy legislation for Irian Jaya. The Council is looking for person with the following qualifications and experience:

- skilled in drafting legislation for autonomy or devolution;
- good Bahasa Indonesia *or* the potential to achieve a good level with 2 months submersion training;
- experience of the process of devolution;
- experience of working in a country with devolved powers;
- familiarity with multi-ethnic societies in conflict.; experience of conducting training in legal procedures;
- computer literate;
- physical fitness for the tropics;
- a self-starter.

Legislative drafting vacancies

The consultant will be attached to Cendrawasih University at Jayapura in West Papua (Irian Jaya) and will be required to—

- support university staff in the preparation of regulations which will give life to the Special Autonomy legislation, and
- train Assembly members, university staff and government officials in the development of the above regulations, and
- develop, organise and conduct a short training course in the UK for key personnel.

Any interested CALC member who has the necessary skills and experience should contact Dr. Muriel Dunbar, Deputy Director, British Council in Djakarta. Her e-mail address is Muriel.Dunbar@britishcouncil.or.id

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