Commonwealth Association of Legislative Counsel

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Editorial Policies

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

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

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Disclaimer

The views expressed in the articles contained in this issue are those of the contributors alone and do not necessarily reflect those of the CALC Council.

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Editor's Notes

CALC Conferences are a fruitful source of articles for the *Loophole*, which in turn serves to help bring the Conference proceedings to our many members who are unable to attend them. The Edinburgh Conference in April of this year was, by any standard, a great success in terms both of the range and quality of presentations as well as the outstanding turnout of almost 200 participants. The theme of "Legislative Counsel: Catalysts of Democracy and Keepers of an Effective Statute Book" spanned the wide range of roles that legislative counsel play, both generally and more specifically in various Commonwealth countries.

Catalysing democracy took shape in presentations on the role of legislative counsel in the establishment and development of legislatures in the British Isles (Scotland, Wales and Northern Ireland) as well as the challenges of safeguarding accountability in smaller jurisdictions such as Brunei, the Isle of Man and the Yukon Territory in Canada. Two further presentations explored gender issues in drafting legislation and legislative reforms intended to give an effective voice to women in government and public affairs in two African countries, Ghana and South Africa. And finally, two presentations addressed the role of judges in the interpretation of legislation and raised questions about how democracy is reconciled with interpretive techniques and the assumptions underlying them.

A series of further presentations focused on more technical, but no less important, roles relating to keeping the statute book in terms of drafting particular types of provisions or subordinate instruments. These presentations also considered broader efforts to maintain and improve the intelligibility of legislative texts through statute revision, data-mining and the training and involvement of legislative counsel in their preparation.

Over the next year, the *Loophole* will publish the papers presented at the Edinburgh Conference. This will provide those who attended the conference with papers that reflect further consideration and updating. For those who were unable to attend, it will provide the next best thing to being there: thoroughly researched and refined papers providing unparalleled insight into important questions of concern to legislative counsel throughout the Commonwealth and beyond.

This issue begins with two articles on maintaining the statute book: Ross Carter looks at the statute revision process in New Zealand while Robin Hodge mounts a stirring defence of the role of legislative counsel. This issue continues with two articles on gender issues and legislative drafting: Estelle Appiah's account of recent legislative developments in Ghana and Tsitsi Chitsiku's assessment of the effectiveness (or not) of legislative initiatives in South Africa. These articles will get you thinking about the roles of legislative counsel and perhaps even inspire you to be a catalyst for democracy and a keeper of the statute book.

John Mark Keyes

Ottawa, July 2015

Revising our Statute Books— Developments and Prospects in New Zealand

Ross Carter[1]

Abstract

This article discusses what "revision" means, and other ways of updating. It reviews earlier efforts at updating in New Zealand, and notes similar efforts elsewhere. The developments it discusses are revision Bills under the Legislation Act 2012. The article assesses the prospects (risks and promise) of New Zealand's revision programmes, before closing with some comments on, and on how revision fits into, legislative counsel's role.

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[1] Parliamentary Counsel, New Zealand Parliamentary Counsel Office (PCO). David Noble, Ian Jamieson, and Scott Murray, Parliamentary Counsel, Julia Agar, PCO Senior Policy Adviser, and Jason McHerron, Barrister, commented generously and insightfully on drafts, but this article does not state their views or those of the New Zealand PCO or New Zealand Government.

Introduction

Legislation can be or become inaccessible. Problems can start soon after enactment. For example, legislation may use archaic language, it may refer to repealed legislation, it may have lost coherence via amendment, or it may not follow current drafting practice. Over time it may as well become not merely inaccessible but also, in various other ways, ineffective and not fit for purpose.

Accessibility involves 3 key ideas: availability, navigability, and clarity. This article is mostly about enhancing the second and third of those ideas. That is, once legislation is available to users, making it easier for them to find and to understand the relevant law.

Accessibility can be improved in ways that include the following:

- *reprinting* – republishing it to show amendments, commencements and repeals, to omit spent provisions, to reformat it, or to include non-substantive corrections or updates;
- *revision* – re-enacting it in updated form with no, or only minor, substantive changes; revision can be done selectively or wholesale; a selective approach allows prioritisation in programmes of revision that can fit with reprints and re-enactments;
- *re-enactment* – re-enacting it with both updating and substantive changes.

New Zealand's *Auctioneers Act 1928* (now replaced by the *Auctioneers Act 2013*)[2] is an example of law that had become inaccessible and no longer fit for purpose. Reform of this legislation involved re-enacting it with both formal updating and substantive changes.[3] Some updating was done earlier and by way of reprinting (for example, references to Stipendiary Magistrates and Magistrates Courts had been replaced with references to District Court Judges and District Courts).[4]

Non-substantive revision allows replacement of archaic terminology (for example, "outcry",[5] "puff"[6]), and the use of modern terms (for example, "real time"[7]). But it cannot

[2] 2013, No. 148.

[3] Appendix 1 of this article summarises the changes.

[4] Under the *Legislation Act 2012*, s 25(1)(c), "a reference to the name or title of a body, an office, a person, a place, or a thing that has been changed may [in a reprint] be replaced with a reference to the name or title as changed", if (s 24(2)) the change does not change the effect of the provision.

[5] Puff = *OED online*, sense 6b = "Inflated or unmerited praise or commendation; an instance of this; an extravagantly laudatory advertisement or review".

[6] Outcry = *OED online*, sense 3a="A public sale to the highest bidder; an auction." Sense 3b="The crying of articles in the streets for sale".

[7] Real time = *OED online*, "in real time: performed or occurring in response to a process or event and virtually simultaneously with it". This fairly new term has been used in New Zealand legislation, for example, in the *Financial Markets Conduct Act 2013*, s 355 (Licensed market operator must ensure Financial Markets Authority has access to real-time trading and other information), and the *Crimes Act 1961*, s 216G(2)

take account of new technology (for example, by using technology-neutral wording), or update maximum penalties. But outdated gender specific language can be changed in a reprint to gender-neutral language that is consistent with current New Zealand legislative drafting practice, if that change is also consistent with the purpose of the legislation being reprinted.[8]

Substantive change must be made apart from revision – so usually before or after revision and not with effect at the same time. But revision can include, as is discussed below, any necessary repeals, savings, and transitional provisions. Savings and transitional provisions need attention if the updating option preferred is revision or re-enactment. The re-enactment of New Zealand's auctioneering legislation did not incorporate an intended lead-in period for the changeover.[9]

Background – New Zealand

New Zealand, like many comparable jurisdictions, has made many attempts to enhance the accessibility of out-of-date laws.[10] These efforts include, in high-level outline form only, the following features:

- private initiatives, government initiatives, and public-private partnerships;
- reprints (some with legislated accuracy presumptions) and re-enactments;
- printed copy products, and electronic copy products;
- single Act efforts (part of annual volumes, or in separate reprints volumes);
- more comprehensive ("big bang") efforts in separate reprint volumes or in legislation in force databases;
- one-off rewriting, and cumulative staged rewriting;

(inserted in 2006, saying intimate visual recording includes unstored recording made and transmitted in real time).

[8] See the *Legislation Act 2012* (NZ), ss 25(1)(a) and 31(4). An example of gender specific language is the *Mercantile Law Act 1908* referring to "warehouseman". Compare the *Juries Amendment Act 2008* (NZ), s 14, replacing "foreman" with "foreperson" of the jury in the *Juries Act 1981*(NZ), s 21.

[9] Auctioneers who held a licence current when the *Auctioneers Act 2013* commenced on 18 December 2013 were deemed registered until 18 June 2014, and could apply to be registered before then: see s. 26.

[10] Appendix 2 of this article summarises New Zealand's main efforts to date. See, for example, the discussions in or by Sidey, "Revising the New Zealand Statute Book—An Historical Survey : From Landmark to Landmark" (1932) *NZLJ* 300; Mason, "One Hundred years of Legislative Development in New Zealand" (1941) *Journal of Comparative Legislation and International Law,* Third Series, Vol. XXIII, Part I, 1, 12–13; Burrows, "Consolidation Acts" (1983) 2 Canta LR 1; D. Elliott, "Access to the Statute Law – The Consolidation and Revision of Legislation" (NZLC PP8, 1988) at 106–124; D. Elliott, "Access to Statute Law in New Zealand" (1990), 20 VUWLR 131; G. Lawn "Improving Public Access to Legislation: the New Zealand Experience (so far)" (2004) 6 University of Technology Sydney Law Review 47; and Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008).

- use or not of related explanatory material, for example, 1931 reprint notes of cases;
- institutional reforms (for example, a statutory office with 2 departments each with separate functions and with discrete resourcing for those functions);
- judicial responses to the law in its revised or more up-to-date form.

Most of those features are explored in detail only below. But one feature of reprints is that they can involve renumbering. This renumbering involves an Order in Council (made under the *Legislation Act 2012*, section 25(1)(b) and (2)) that authorises reprinting (including consequential amendments) using renumbering as at a stated date and in accordance with a comparative table of old and new numbers. For example, the *Social Security Act 1964*, section 86,[11] has 27 subsections (separated by 8 subsection headings). Of those 27 subsections, 5 have been repealed.[12] These renumbering powers are yet to be used. And, when used, lawyers and others will have to marry up new numbering with outdated references in contracts or other documents, whose numbering will not, of course, have been altered consequentially by the renumbering order. This renumbering might, even so, help users a great deal.

Background – elsewhere

New Zealand has also learned from the revision of legislation in other jurisdictions.[13] I do not attempt in this article to deal fully with their arrangements, but one example from another Southern Hemisphere jurisdiction is instructive.

The Falkland Islands has recently considered its revision arrangements. The consideration has been helped by expert input, including a report from Daniel Greenberg and Philip Davies.[14] His Excellency the Governor in 2014 appointed as Law Commissioner Rosalind Cheek, who took up this post on 16 June 2015.[15] The appointment revives the statutory

[11] As at 7 December 2014.

[12] The remaining 22 are as follows: (1), (1A), (1B), (1BA), (1BB), (1BC), (1BD), (2), (2A), (2B), (2C), (3), (3A), (4), (5), (6), (7), (8), (9), (9A), (9B), and (9C).

[13] Chapter 7 of Law Commission (in conjunction with PCO) *Presentation of New Zealand Statute Law* (2008, NZLC R104) reviews revision arrangements in jurisdictions in Canada, in Australia, and in the UK. For other relevant literature on revision and other maintenance of the Statute book, see the items listed at pages 33−36 of Nick Horn's *Catalogue of CALC publications* (2nd edition, 2012). See also, F. Bennion, "Publishing Laws: What Can We Learn from a Colonial System", (April 2005) 14 Com L 32 (about Ghana); Sir Edward Caldwell in Opeskin and Weisbrot *The Promise of Law Reform* (Irwin Law: Toronto, 2005), ch 3; Dr Duncan Berry (2010) 36(1) Commonwealth Law Bulletin 79; and Dr Helen Xanthaki *Drafting Legislation – Art and Technology of Rules for Regulation* (Hart Publishing: Oxford, 2014), ch 15.

[14] Daniel Greenberg and Philip Davies, *Report on Falkland Islands Government Law Revision Consultancy* (June 2013).

[15] See the Revised Edition of the *Laws Ordinance*, s 3, and Report of the Attorney General (Falkland Islands), "Law Commissioner", Paper 189/14, 24 September 2014. See also http://www.falklands.gov.fk/assets/267-13P.pdf . I am very grateful to Falkland Islands Law Commissioner Rosalind Cheek for helping me with this section of this article.

office of Law Commissioner. That office was initially tied to the 1993-2005 revision of the Falkland Islands statute book, but still exists even though it has, in recent years, been vacant. The Law Commissioner is to drive forward a Revised Laws programme under an Action Plan, and then to continue to be responsible for law revision and consolidation for the Falkland Islands.

The background to the current project is interesting.[16] The laws of the Falkland Islands derive from several sources:

- locally enacted primary and secondary legislation;
- directly applicable UK laws; and
- indirectly applicable UK laws (including common law and equity).

A previous revision and consolidation of Falkland Islands laws ("the Revised Laws of the Falkland Islands"), which was published in hard copy between 1993 and 2005, is considered no longer fit for purpose because the Revised Laws have not been kept up to date, and the substantive law (the *Interpretation and General Clauses Ordinance*) which underpins the indirect application of UK laws to the Falkland Islands is unclear and appears to be flawed.

The *Revised Edition of the Laws Ordinance 1991* (Title 67.3) resulted in the production of Revised Laws of the Falkland Islands, published in hard copy loose-leaf form in 1993. Some Revised Laws titles were incrementally updated, some as far as 1 July 2005. The 1991 Ordinance was amended in 2006 to enable the Revised Laws to be published electronically. The amended Ordinance provided that the Revised Laws would be produced annually in electronic format. However, the work as contracted out by the Attorney General's Chambers was not sufficiently comprehensive in that the contents of the computer disc produced appeared to be incomplete and have never been published as envisaged under the *Revised Edition of the Laws Ordinance* (nor made available outside the Government). As that fact indicates, the statute book of the Falkland Islands is not optimally accessible because there is some unavailability of, or uncertainty about what is, the definitive legislative text.

Developments – New Zealand

The developments this article analyses most closely are revision Bills under Part 2, subpart 3 of the *Legislation Act 2012*.

In 2008, the Law Commission made the following recommendations:[17]

[16] Above n. 14, Annex 5 (Invitation to Tender) at 224−242.

[17] Law Commission *Presentation of New Zealand Statute Law* (2008, NZLC R104) 11. The Commission's project was undertaken in conjunction with PCO. PCO had input into the Commission's report and supported the Commission's recommendations. PCO led the Government response to them. The New Zealand Law Commission's functions include (a) to take and keep under review in a systematic way the law of New Zealand; and (b) to make recommendations for the reform and development of the law of New Zealand: see *Law Commission Act 1985*, ss 3 and 5(1).

CHAPTER 7

R15 The PCO should undertake a triennial programme of statute revision, the aim of which is to make the statutes more accessible without changing their substance.

R16 The PCO should have statutory powers to alter the wording, order and placement of the provisions subject to revision.

R17 When a revision is complete it should be certified by a committee comprising the Chief Parliamentary Counsel, the Solicitor-General, the President of the Law Commission and and a retired judge appointed by the Attorney-General, as changing only the presentation of the law, and not its meaning or spirit.

R18 The revision bill, once certified, should be passed by the streamlined Parliamentary process described in this chapter.

R19 If a bill involves a change of substance or policy it would be subject to the normal parliamentary process.

R20 If in the course of the process of revision provisions are found that are obsolete and thus no longer required, they should be proposed for repeal through the medium of an omnibus Statutes (Repeal) Bill.

R21 Those responsible for the preparation of legislation should note that it is desirable that, if a proposal for amending an Act makes substantial and far-reaching changes to the Act, the Act should generally be repealed and completely replaced.

The Government mostly agreed. It supported the proposal for a statutory requirement to carry out a revision programme. The contents of the programme would be settled by Ministers and be based on available resources. The Attorney-General would have discretion (not a duty, as the Law Commission recommended) to introduce a certified revision Bill, and a fast-track procedure for enacting revision Bills would be specified in Standing Orders (rather than in a statute).

The *Legislation Act 2012* implemented the proposal to establish three-year programmes of systematic revision of Acts. As well as making editorial reprints changes (ones that sections 24 to 26 of the Act indicate could be made in a reprint), a revision may (among other things):

- revise, combine or divide Acts;
- adopt a new Title;
- include new provisions (such as purpose and overview provisions, or diagrams) to aid accessibility and readability;
- clarify the intent of the legislation (minor amendments to clarify Parliament's intent or reconcile inconsistencies);

- update specified monetary amounts (unrelated to jurisdiction, offences, or penalties), having regard to movements in the Consumers Price Index;[18] and
- amend consequentially other legislation affected.[19]

A revision Bill must be suitable for introduction into the House of Representatives (but may be divided into two or more new Bills), and must set out, in general terms in its explanatory note, inconsistencies, anomalies, discrepancies and omissions identified in preparing, and remedied by, the Bill.[20] It must also be submitted to certifiers,[21] who may certify it if satisfied that the revision powers have been used appropriately and that it does not change the effect of the law, except as authorised. Authorised changes are minor amendments to clarify Parliament's intent or to reconcile inconsistencies, or changes to update, or to provide for prescription by Order in Council of, monetary amounts unrelated to jurisdiction, offences, or penalties.[22] The certifiers may require that a revision Bill be changed before introduction.[23]

Revision Bills are exempt from requirements for a Regulatory Impact Statement and a Legislative Disclosure Statement.[24] But before introduction they are to be vetted for inconsistency with rights and freedoms stated in and affirmed by the *New Zealand Bill of Rights Act 1990*.[25]

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[18] The penalties in the *Secret Commissions Act 1910*, s 13 ($2000 for a corporation, or 2 years' imprisonment or $1000 for any other person) have, for example, been criticised as "a bit light": Rob Stock, "Century-old corruption law carries wrist-slap penalties", *Sunday Star Times*, 1 December 2013. Before its repeal on 17 June 2014, the *Layby Sales Act 1971*, s 7(1) provided: "The seller shall, within 7 days after he has received a request in writing from the buyer *and the buyer has tendered to the seller the sum of 25 cents* for expenses, give to the buyer a statement in writing" (emphasis added).

[19] *Legislation Act 2012*, s. 31 (revision powers).

[20] *Legislation Act 2012*, s. 32 (format of revision Bill).

[21] The certifiers are the Law Commission's President, the Solicitor-General, a retired High Court Judge (nominated by the Attorney-General), and the Chief Parliamentary Counsel. The Hon John Priestley CNZM QC was appointed as the retired High Court Judge certifier for the first three-yearly statute revision programme under the *Legislation Act 2012*: Attorney-General, 15 July 2014 media release: http://beehive.govt.nz/release/statute-revision-bill-certifier-appointed.

[22] *Legislation Act 2012*, ss 31(2)(i) and (j) (revision powers) and 33 (certification of revision Bill).

[23] *Legislation Act 2012*, s 33(4).

[24] Treasury *Regulatory Impact Analysis Handbook* (August 2013) at [3.1] (exemptions, technical revisions or consolidations to improve clarity or navigability); Treasury *Disclosure Statements for Government Legislation: Technical Guide for Departments* (1 July 2013) at p 7 (revision Bills exempt). See also Legislation Amendment Bill 2014 (213—1) cl 9, new Part 3A, new s 57D(d).

[25] *New Zealand Bill of Rights Act 1990*, s 7. Some revision Bills will not be rights-consistent because they pre-date the *New Zealand Bill of Rights Act 1990*, and to make them rights-consistent would be to alter impermissibly the effect of the law. Compare the *Income Tax Bill 2002* attracting an Attorney-General's s 7 report for re-enacting provisions contrary to s 19 of the *New Zealand Bill of Rights Act 1990*. Compare also re-enacting outdated (pre-the Algie Committee's 1962 report) subjective empowering regulation-making powers, such as the one in the *Health Act 1956*, s 117(1):

Standing Order 271(1) 2014 defines a "revision Bill" as a Bill certified under section 33 of the *Legislation Act 2012*, and ensures that the special fast-track enacting process that the House adopted in 2014 for revision Bills applies only if the Bill is certified under section 33 and the certificate[26] is presented to the House on the Bill's introduction.

It would help people scrutinising a revision Bill if its title identified it as a revision Bill. But, once enacted, whether an Act is a "revision Act" (one resulting from enactment of a revision Bill) is likely to be important only for the presumption in section 35 of the *Legislation Act 2012* against changing the effect of the revised law. Revision Acts will thus likely identify themselves as such by containing a purpose or signpost provision referring to the effect of the presumption (which, as discussed below, does not apply so far as a revision Act expressly provides that a particular provision is intended to change the effect of the law revised). Notably the presumption also applies only to a provision of a revision Act as that revision Act was originally enacted. Later amendments to the revision Act will of course usually be intended to change the effect of the law as stated in the revision Act.[27]
A provision identifying an Act as a revision Act subject to the presumption ought also to identify the former law repealed and revised by the revision Act.[28]

A related point is that many revised Acts will have pre-2000 format long titles that, in line with current legislative drafting practice, will often be converted into and re-enacted as purpose provisions in a revision Act.[29] The old long titles may state that the Act to be

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> The Governor-General may from time to time by Order in Council make such regulations as may in his opinion be necessary or expedient for giving full effect to the provisions of this Act, and for all or any of the following [specified particular] purposes….

On the Algie Committee's 1962 report see Carter, McHerron, and Malone, *Subordinate Legislation in New Zealand* (Lexis Nexis: NZ Limited: Wellington, 2013) at [4.0.2] and [4.0.15].

[26] The Act does not provide for prescription or approval of a form of certificate for the purposes of s 33.

[27] Compare substantive amendments in or after 2008 to the law in the *Income Tax Act 2007* (most provisions of which were ones to re-enact without deliberate policy changes the former tax law). However, notably the *Income Tax Act 2007* s ZA 3(4) (Using old law as interpretation guide) expressly applies only "where the meaning of a taxation law *that comes into force at the commencement of this Act* (the new law) is unclear or gives rise to absurdity" (*emphasis added*). Arguably the *Legislation Act 2012*, s 35(2) could usefully be confined expressly to a revision Act provision *that comes into force at the commencement of the Act*. That formulation would seem to apply satisfactorily even to a revision Act that is to amend an earlier revision Act (for example, in a phased cumulative revision).

[28] Compare provisions of Acts in the 1908 re-enactment indicating that they consolidate former Acts listed in their Schedules, for example, the *Sale of Goods Act 1908*, s 2(2) and Schedule.

[29] See, for example, the *Property (Relationships) Amendment Act 2001* ss 4 (title repealed) and 7 (inserting a new s 1M (Purpose of this Act)). Compare the *Fair Trading Amendment Act 2013*, ss 4 and 5, and Ministry of Consumer Affairs, *Consumer Law Reform – A Discussion Paper* (June 2010), at 21−26 (consulting on possible new purpose statements). New Zealand's contracts statutes have the following long titles (most not stating the purpose of the law enacted in them):

> (a) *Contracts (Privity) Act 1982*—An Act to permit a person who is not a party to a deed or contract to enforce a promise made in it for the benefit of that person;
>
> (b) *Contractual Mistakes Act 1977*—An Act to reform the law relating to the effect of mistakes on contracts (but see also s 4, a provision stating expressly the purpose of that 1977 Act);

revised amended or reformed former law, but not also state in any other, more meaningful, way the purpose of the law enacted by the Act to be revised. Of course, a new express purpose provision has the potential to change the effect, for example by guiding in a new or unexpected way the exercise of discretions in the revision Act. After approval by the Government, a revision programme must be presented to Parliament.

The Attorney-General invited submissions by 25 August 2014 on a draft of the first revision Bill programme, the revision Bill programme for 2015−17. [30] The approved 2015−17 programme[31] was presented to the House on 9 December 2014. In a media release that day, the Attorney-General said "It is the start of a systematic programme of statute revision which will make the law clearer and more accessible for New Zealanders". [32]

Among revision Bills to be started during 2015−17 is a Contracts and Commercial Bill to revise and consolidate 11 Acts, including six contracts statutes. The Law Commission envisaged 2 main types of revision Bill: (1) one that tidies a single Act and redrafts it in modern language; and (2) one that brings together in one new Act provisions on like subjects that are currently spread over several Acts.[33] The Contracts and Commercial Bill clearly falls into the second category.

In its 25 August 2014 submission on the draft programme, the New Zealand Law Society expressed caution about changing statutory language that is the subject of well-established judicial interpretation, despite the independent certification process.[34] However, it also

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(c) *Contractual Remedies Act 1979*—An Act to reform the law relating to remedies for misrepresentation and breach of contract;

(d) *Frustrated Contracts Act 1944*—An Act to amend the law relating to the frustration of contracts:

(e) *Illegal Contracts Act 1970*—An Act to reform the law relating to illegal contracts;

(f) *Minors' Contracts Act 1969*—An Act to restate and reform the law relating to minors' contracts.

[30] See Parliamentary Counsel Office, "Consultation on first revision programme", available at http://www.pco.parliament.govt.nz/revision-consultation/ and Release, "Statute Revision Bill Certifier Appointed", 15 July 2014, available at http://beehive.govt.nz/release/statute-revision-bill-certifier-appointed. See also the New Zealand Parliament's notice: "Consultation on revision programme to improve readability of Acts of Parliament": http://www.parliament.nz/en-nz/features/00NZPHomeNews201408181/consultation-on-revision-programme-to-improve-readability and New Revision Bill Programme 2015-2017 *Law News* 25 July 2014: http://www.adls.org.nz/for-the-profession/news-and-opinion/2014/7/25/new-revision-bill-programme-2015-2017/.

[31] Parliamentary Counsel Office (NZ), "Revision Bill Programme 2015-2017", available at http://www.pco.parliament.govt.nz/revision-programme-2015-to-2017/.

[32] Release, "First Revision Programme of Statutes Begins", available at http://www.beehive.govt.nz/release/first-revision-programme-statutes-begins.

[33]NZLC R104, 2008 at [7.71]−[7.76]. The *Legislation Act 2012* itself also falls into the second category, given it brought together in one Act the main provisions of New Zealand legislation that relate to the drafting, publication, and reprinting of legislation, and the disallowing of instruments. It is also proposed to be amended to include the Interpretation Act 1999 and provisions on disclosure: Legislation Amendment Bill 2014 (213—1).

[34] New Zealand Law Society, comments on "*Legislation Act 2012* — first Statutes Revision Programme 2015–2017", 25 August 2014; and "Some reservations over statutes revision" *LawTalk* 852 (10 October 2014) 29: https://www.lawsociety.org.nz/lawtalk/issue-852/some-reservations-over-statutes-revision. The

indicated willingness to have its specialist committees scrutinise pre-introduction exposure drafts to help avoid inadvertent changes to the law, even though a revision Act is intended to change the effect of the law in the legislation it revises only as so far as the Act expressly so provides.[35] The Society's caution was counterbalanced by the Chief Parliamentary Counsel, David Noble highlighting all the safeguards that are built into the revision process.[36]

The fast-track enacting process the House adopted in 2014 enables select committee scrutiny.[37] But public submissions on, and amendments proposed to, revision Bills, are limited by their very narrow scope,[38] and they are scrutinised by a subject select committee nominated in each revision Bill's explanatory note, rather than by a specialist revision Bills committee.[39] Amendments at a committee of the whole House stage are also possible (under Standing Order 271(5) 2014) if—

- the Business Committee determines that the Bill should have a Committee of the whole House stage (instead of proceeding immediately to its third reading),
- the Minister in charge requires the House to resolve itself into committee to consider an amendment that is in order, or
- another member's amendment (that is in order) has been circulated on a Supplementary Order Paper (an SOP), or lodged with the Clerk, at least 24 hours before the House meets on the day on which the Bill is read a second time.

submission itself is at: https://www.lawsociety.org.nz/__data/assets/pdf_file/0007/82393/I-PCO-Statutes-Revision-Programme-25-8-14.pdf.

[35] *Legislation Act 2012*, s 35 (Revision Acts not intended to change effect of law). Section 34(2) preserves the House's ability to amend for any purpose, and pass as amended, a revision Bill (as introduced). But "out-of-scope" amendments that change significantly the law revised will require authorisation by the House by instruction, and so are likely to be very rare: (2014) *Appendix to the Journals of the House of Representatives* (AJHR) I.18B at 22.

[36] David Noble "Implementation of the *Legislation Act 2012* and further improvements in the development, design and presentation of legislation in New Zealand" in *CPD Top Up Day* (NZLS CLE Ltd Seminar, February 2015) 25 at 37−40.

[37] SO 271 (2014); (2011) AJHR I.18B at 5 and 37−39; (2014) AJHR I.18B at 5 and 21−22 (http://www.parliament.nz/resource/en-nz/50DBSCH_SCR56780_1/5b3f0906a023a3728df0e64dff9db13295214dab); Parliamentary Counsel Office *Annual Report 2013/14* (2014) AJHR A.9 at 6, 9−10 and 56 (http://www.pco.parliament.govt.nz/assets/Uploads/pdf/2014report.pdf).

[38] (2014) AJHR I.18B at 21−22 (scope of revision Bills): "The restricted remit of this process should be explained in advertisements calling for submissions to reduce the prospect of attracting substantive proposals about policy matters that committees would be powerless to implement." Revision Bills may also be permitted omnibus Bills: SO 263(a) (2014) (single broad policy).

[39] A specialist committee was favoured by the Law Commission and by the Regulations Review Committee *Legislation Bill 2010* (162—2) at 2−3.

The enacting process is a fast-track one; the only routinely debatable stage is the second reading, the number and length of the calls for which are determined by the Business Committee.[40] This reflects that

> the narrow purpose of revision Bills and [their] restrained pre-introductory process justifies a procedure to ensure that revision bills do not unduly occupy the Government's time in the House.[41]

Revision Bills are Government Bills, but Parliament enacted the requirement for systematic revision programmes, and the House's process can certainly meet or frustrate the public interests served by revision Bills. The Standing Orders Committee in 2014 noted the Parliamentary Counsel Office's (PCO) concern that delays in debating revision Bills could affect their timely passage, and so delivery of revision programmes. It responded

> However, the use of extended sittings for the consideration of non-controversial bills has proved particularly successful. We encourage the Business Committee to take a constructive approach to ensuring revision bills are passed in good time, because of the public interests that they serve.[42]

Revision Bills on three-year systematic programmes of revision are a very promising new way to enhance access to New Zealand legislation if enough resources and parliamentary time can be devoted to them. The PCO's *Performance Improvement Framework Review* proposed that the PCO becomes the "guardian" or "steward" of the New Zealand Statute Book.[43] That proposal was advanced in line with the *Legislation Act 2012's* more specific purpose of making the New Zealand Statute Book more accessible and easier to read through the specific, and limited, new function of revision.[44]

Prospects – New Zealand

"It is too early to say",[45] at least categorically or definitively, what are the prospects of modern systemic programmes of revision of New Zealand statute law. And it is not clearly

[40] SO 271(4)−(5); and (2014) AJHR I.18B, p 21.

[41] (2014) AJHR I.18B, p 21.

[42] (2014) AJHR I.18B, pp 21−22.

[43] State Services Commission, Treasury and Department of the Prime Minister and Cabinet *Performance Improvement Framework (PIF) Review of the Parliamentary Counsel Office (PCO)* (November 2014) p 2 (noting also that a wider guardianship function would need a high degree of support, agreement and engagement from the Executive (in particular the central agencies) and Parliament (including the Clerk of the House of Representatives). The chief executive of a department or departmental agency is responsible to the appropriate Minister for the *stewardship* of the legislation administered by the department or departmental agency: *State Sector Act 1988*, s 32(1)(d)(ii) (emphasis added).

[44] *Legislation Act 2012*, s 3(e).

[45] Zhou Enlai's answer, when asked in 1972 for his assessment of the French Revolution 1789 (or possibly the French protests of 1968), see "Zhou's cryptic caution lost in translation" by Richard McGregor in *Financial Times* (10 June 2011): http://www.ft.com/cms/s/0/74916db6-938d-11e0-922e-00144feab49a.html#ixzz1PDuP8ZzG).

ironical, or overly evasive, to say so, given the novelty of those programmes. However, even now, identified risks include the following:

Risk 1: lack of resources for, or prioritisation of, development of revision Bills:

Risk 2: revision will be hard to coordinate with separate substantive reforms:

Risk 3: lack of parliamentary time to progress revision Bills introduced:

Risk 4: unintended consequences of rewriting to improve form but not alter effect.

Risks 1 and 2

Parliament and the Executive Government are committed under the *Legislation Act 2012* to systematic programmes of revision, approved after public consultation. The programme (both in draft form and as approved and presented) is limited to Bills that can be drafted during 2015−17. This takes into account resources available within PCO and government departments that administer Acts being revised. A Contracts and Commercial Bill is expected to be enacted during 2015−17. But work is also expected to continue during that three-year revision period on the other 6 proposed revision Bills on the programme. These steps are, as the Chief Parliamentary Counsel, David Noble, noted in February 2015, a long way from the much more comprehensive ("big bang") 1908 re-enactment:

> For the effective revision of the statute book, to achieve a more accessible Statute Book for the 21st Century, the active support of all public service agencies with stewardship responsibilities under the State Sector Act for their legislation, and of Parliament, is critical. Change must also be supported by those outside government, including the legal profession. Otherwise at the current rate of progress it will take 400 years to replicate what our forebears did in their 1908 Revision.[46]

The functions of the New Zealand Parliamentary Counsel Office (PCO) include "to revise Acts in accordance with the current revision programme (as provided in [subpart 3 of] Part 2 [of the *Legislation Act 2012*])".[47] Early in the development of the Contracts and Commercial Bill, PCO is operating without drafting instructions from the administering departments (the Ministry of Business, Innovation and Employment, and the Ministry of Justice). PCO is therefore doing its own research for, and analysis of, relevant case law. The departments may well lack prioritised resourcing, or recent institutional experience, to help. The revision Bill development work thus involves the PCO doing instructing or policy development work of a kind that, for comparable non-revision Bills, would be done by others. But even core drafting work on revision Bills is likely to absorb considerable time and effort. Examples are

[46] David Noble in *CPD Top Up Day* (NZLS CLE Ltd Seminar, February 2015) at pp 34−35.

[47] *Legislation Act 2012*, s 59(1)(f).

consequential amendments to related legislation, and replacing forms in Acts with powers authorising making of regulations prescribing the forms.[48]

Coordinating revision with substantive reforms could in principle be difficult. But difficulties should be reduced in practice. For revision Bills from 2015−2017, previous experience may be instructive. The *Statutes Drafting and Compilation Act 1920*[49] aimed to ensure resources for enhancing access. It pursued that aim by the institutional structural means of dividing the Law Drafting Office[50] into 2 departments: the Bill drafting department and the Compilation department. The Attorney-General, Sir Francis Bell, explained to the Upper House what he hoped to achieve by separating the Bill Drafting Department ("we have been very short-handed in Bill drafting") from the Compilation Department, namely "continuous compilation and a practical end to the condition of the statute book since 1908":

> The duties [of the 2 Departments of the Office], as honourable gentlemen will see, are carefully distinguished by Departments, so that the officers of one Department shall not be performing the duties of the other. The real reform that I have been trying to effect is that the compilation officers will not be taken off their own work. I hope that at the beginning of the next session Parliament will have to consider two sets, and two entirely and distinct and separate sets, of laws—one presented by the Law Drafting Department under the direction of a Minister of the Crown, comprehending amendments to the existing law, and the other for the consideration of the Legislature, consisting of the consolidation and compilation of already existing law upon the various subjects.[51]

Experience with the operation of the 1920 Act is not especially encouraging. There was a burst of compilation Bills consolidating major statutes undertaken in the mid-1920s by the former Justice F R Chapman as Compiler of Statutes.[52] But that apart, enacted compilation Bills that were pure consolidations were rare (examples are the *Income Tax Act 1976* and *Land Tax Act 1976*). The place of consolidations has been taken by reprints. Further, the office of Compiler of Statutes (abolished by the *Legislation Act 2012*) was often vacant and the Compilation department not staffed or under staffed. Even when staffed, tensions arose between the 2 departments.

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[48] *Legislation Act 2012*, s 31(2)(k) and (l). The revision powers in s 31 of that 2012 Act do not include replacing forms prescribed by an Act revised with a power for administrators to approve forms. See Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (2013) at [4.0.7].

[49] 1920, No. 46.

[50] Renamed the Parliamentary Counsel Office (PCO) on 21 November 1973: *Statutes Drafting and Compilation Amendment Act 1973.*

[51] (1920) 188 NZPD 745–746 (20 October 1920).

[52] Examples are the *Land Act 1924*, *Rating Act 1925*, *Chattels Transfer Act 1924*, *Mining Act 1926*, *Coal Mines Act 1925*, *Industrial Conciliation and Arbitration Act 1925*, *Electoral Act 1927*, and *Magistrates' Courts Act 1928*.

One example of these tensions is a 1951 proposal that the *Death Duties Act 1921* and the *Stamp Duties Act 1923* be turned into compilation Bills, but also be amended in various ways. This led to A E Currie, as Compiler of Statutes, receiving on 13 July 1951 a letter[53] from Deputy Commissioner of Stamp Duties, FR Macken stating that he

> . . . drew the attention of the Minister of Stamp Duties to the progress of the Compilation Bills and submitted for his direction the following alternative procedures:-
>
> (a) To put the compilation bills through the House at the commencement of the session and then proceed to the proposed amendments.
>
> (b) To put the amendments through and then revise the compilation bills to incorporate them.
>
> (c) To introduce the amendments into the bills as now compiled and go to the House with complete amending and consolidating bills.
>
> The Minister, after reference to the Attorney-General, has directed that alternative "(c)" should be adopted. This course will eliminate the introduction of the Compilation Bills as such.

It seems to have been fairly routine in the 1950s for Compilation Department Bills to be taken over by the Bill Drafting Department on account of amendments proposed to the Acts to be compiled. Also notable is the suggestion in a 19 March 1952 memo from the Compiler of Statutes to the Attorney-General that "[y]ou have mentioned that the Legislation Committee of Cabinet may be glad to arrange for the immediate introduction and prompt passage of Compilation Bills which by convention are not debated." On 3 March 1952, Currie had written[54] to the Attorney-General saying

> [y]ou will remember that last session curtailment of the legislative programme had the result that of compiling Bills prepared only one – the *Valuation of Land Act 1951* – was introduced into Parliament and enacted. . . . I suggest that in the approaching session the compiling Bills be introduced as soon as possible, and, since they are conventionally not debated, be got out of the way as soon as the Leader of the House sees fit so to arrange.

If modern revision programmes target Acts that are stable – in that the policy they implement is unlikely to change during revision – this will help minimise needs to coordinate two parallel streams of proposed new legislation: revision Bills and re-enactment Bills. If the Acts to be reviewed are to include both updating and substantive changes,

[53] Letter from Deputy Commissioner of Stamp Duties, F R Macken, to A E Currie, Compiler of Statutes, dated 13 July 1951. Source: approved reference to unpublished NZ PCO historical files on compilation.
[54] Letter from A E Currie, Compiler of Statutes, dated 3 March 1952, to Attorney-General, Hon Thomas Clifton Webb. Source: approved reference to unpublished NZ PCO historical files on compilation.

substantive re-enactment is required not non-substantive revision.[55] Revision may, even so, identify necessary or desirable substantive changes that are outside the limited revision powers. This could happen pre-introduction, or during parliamentary scrutiny of a revision Bill by a select committee. The changes could proceed by way of a separate substantive amendment proposed before or after (or even with effect at the same time as) the revision Bill. Or, if pressing enough, they might result in a re-enactment Bill taking the place of revision Bill. An analogy might be "pre-consolidation" substantive amendments by way of subordinate legislation.[56] The Law Commission's 2008 recommendations clearly envisaged ongoing use of repeals Acts to get rid of legislation found to be obsolete in carrying out revision.[57] Those recommendations also make it clear that re-enactment Bills following normal full parliamentary legislative process will continue to be needed and, if they make wide-ranging substantive changes, they should re-enact and replace in full existing Acts.[58]

Problems with the law to be revised that cannot be fixed by a revision Bill may put parliamentarians under considerable pressure. Section 34(2) of the *Legislation Act 2012* provides that the Act does not affect the powers of the House of Representatives to amend a revision Bill for any purpose and to pass it with amendment. However, the Standing Orders Committee noted in its July 2014 report, when it recommended amending the Standing Orders to set out a streamlined procedure for revision Bills:

> At the point of introduction the content of a revision bill is tightly constrained under the *Legislation Act 2012*, but the House may nevertheless amend a revision bill for any purpose. However, the previous Standing Orders Committee expressed a strong view that the scope of revision bills should be very narrow:
>
> > While the House is not prevented from amending a revision bill in any way, amendments proposed will need to be relevant to the bill. A revision bill is one that restates the existing law and may clarify its intent. Its scope is limited to that purpose. Amendments that are relevant to that purpose would be admissible, but

[55] An example is the proposed rewrite of the *Social Security Act 1964*: see http://www.msd.govt.nz/about-msd-and-our-work/work-programmes/social-security-act-rewrite/index.html and http://beehive.govt.nz/release/social-security-act-set-rewrite.

[56] Pre-consolidation amendments (to law to be consolidated) and made by way of subordinate legislation, were authorised by,for example, the *Communications Act 2003* (UK), s 407 (see, for example, *Wireless Telegraphy (Pre-Consolidation Amendments) Order 2006* (SI 2006 No 1391). See also the Interpretation and Legislative Reform (Scotland) Bill (a Bill that was introduced into the Scottish Parliament on 15 June 2009), Part 4 (cl 47), removed at Stage 2, after the Standards, Procedures and Public Appointments Committee's Report on the Bill at Stage 1 (2010), at 4−12**:** available at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16390.aspx.

[57] Examples of omnibus repeal or revocation Acts or orders include the *Regulatory Reform (Repeals) Act* 2012 (2012 No 71), and the *Regulatory Reform (Revocations) Order 2011* (SR 2011/99), each of which was self-repealing or or self-revoking.

[58] [C]ontrary to the point of Lord Thring's comparison of Bills to "the razors mentioned by the [18th century] poet" and satirist John Wolcot (pen-name "Peter Pindar"), it is not always impossible to get through Parliament an amendment Bill that repeals all the existing law on the topic and re-enacts it with the desired amendments": Engle (1983) 4(2) *Stat LR* 7 and 8': Carter, 2011-4 *The Loophole* 59−61.

> amendments that go beyond that purpose, for instance, that significantly change the effect of the law, may be outside the scope of a revision bill. Such an amendment would require an instruction from the House. This would effectively limit the nature of amendments that committees could make and militate against the temptation to bring in new policy considerations.
>
> We would like to reiterate this view; adopting this rule would prevent committees, of their own initiative, recommending or adopting amendments that would stray significantly from the revision powers set out in section 31 of the Act. The restricted remit of this process should be explained in advertisements calling for submissions to reduce the prospect of attracting substantive proposals about policy matters that committees would be powerless to implement.[59]

If substantive policy changes in a revision Bill were identified at the select committee stage (allowing Parliament to reassert its intention as to the meaning of provisions being carried forward), they will most likely be dropped out of the Bill in recognition of the need for proper process and public scrutiny of substantive policy changes. The select committee might, for example, note them in its commentary on the Bill as issues that are outside the Bill's scope but that merit separate and later consideration (as even including in the Bill a duty to review operation of all or any of the resulting revision Act would arguably be changing impermissibly the effect of the law revised). The Standing Orders Committee made it clear in 2014 that a revision Bill's scope involves not only its subject matter,[60] but also whether a proposed change is within the revision powers in the *Legislation Act 2012*. Substantive changes unauthorised by the revision powers will thus be out of scope.

An out-of-scope amendment can be considered only on an instruction from the House. A debate on an instruction is one for which no specific time limits are prescribed. In addition, Select Committees and the House are unlikely readily to agree to substantive law changes in respect of which the public has not had fair notice and an adequate opportunity to make submissions.

All this means that revision Bills should rarely if ever be a vehicle for substantive law changes not authorised by the very limited revision powers. Substantive law changes will, almost always, have to be made apart from revision under the *Legislation Act 2012*. That is because revision is only to re-enact, in an up-to-date and accessible form, the law previously contained in all or part of one or more Acts, but revision is (with very limited exceptions) not intended to change the effect of a law.

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[59] Report of the Standing Orders Committee, 50th Parliament, July 2014.

[60] Relevance to the Bill is critical to scope, and whether a proposed amendment is admissible under the Standing Orders and practice of the House of Representatives turns especially on relevance to the subject-matter of the Bill as introduced. However, a Bill's expressed or implicit purpose is also a key guide, for "The bill cannot be turned into something that it is not or that it did not start out as.": D G McGee QC *Parliamentary practice in New Zealand*, 3rd ed. (Dunmore Publishing Ltd.: Wellington, 2005) ch 27.

Risk 3

Lack of parliamentary time to progress revision Bills introduced was a risk anticipated by the Law Commission. Hence its report in 2008 recommended that a fast-track procedure for enacting revision Bills should be specified in statute (not in Standing Orders). The opposite happened: a procedure in Standing Orders that requires debate (rather than simply a negative resolution procedure, without possibility of amendment of the revision Bill concerned).

However, changes made in 2014 to the Standing Orders will mean that revision Bills will be fast-tracked through Parliament. Because these Bills will have no element of new policy in them and will not make substantive changes to the law, the parliamentary examination of them will be narrower than usual.

As noted above, a select committee considering a revision Bill can recommend amendments to it only within its scope, namely to enhance it as a revision Bill. Any amendments recommended for that limited purpose will be considered by the House during, and adopted by the House at the end of, the Bill's second reading debate, which may often be abbreviated, or during extended sittings, under Business Committee determinations. Amendments for that limited purpose can also be lodged for consideration by a committee of the whole House, but the need for this is expected to be very limited.

In 2014, the Standing Orders Committee said:

> We consider that the narrow purpose of revision bills and the restrained pre-introductory process justifies a procedure to ensure that revision bills do not unduly occupy the Government's time in the House. However, this consideration must be balanced by regard for proper process and scrutiny… We acknowledge concern expressed by the Parliamentary Counsel Office that delays arising from the debate of revision bills could affect the timely passage of the legislation, and thus the delivery of the revision bill programme. However, the use of extended sittings for the consideration of non-controversial bills has proved particularly successful. We encourage the Business Committee to take a constructive approach to ensuring revision bills are passed in good time, because of the public interests that they serve.[61]

A review report on revision Bills – the need for, operation and effectiveness of, and any necessary or desirable amendments to, the *Legislation Act 2012*, Part 2, subpart 3 – must be done by the Chief Parliamentary Counsel as soon as practicable after 30 June 2020 – that is, following the first two of the three-year revision programme periods. Any parliamentary inability to pass revision Bills in good time could be identified in that review report.

However, a lot of the time required to complete revision processes will be spent on pre-introduction preparation and scrutiny (including of any exposure drafts). Revision Bills will

[61] (2014) AJHR I.18B, at 21−22: available at http://www.parliament.nz/resource/en-nz/50DBSCH_SCR56780_1/5b3f0906a023a3728df0e64dff9db13295214dab.

undergo parliamentary scrutiny to ensure that revision powers are not exceeded. This scrutiny will mainly take place in select committees, and the House's new procedure means revision Bills will usually only be debated at their second reading. A limited committee of the whole House stage will be held to consider further amendments if there are any. The procedure is designed so the passing of revision bills is not too delayed by the need to find time for them in the House. Amendments to alter policy matters or make significant changes to the substance of legislation will be outside the scope of revision Bills.

Revision Bills are to be scrutinised by a subject select committees nominated in each Bill's explanatory note, rather than by a specialist revision Bills committee.[62] The purpose and scope of a revision Bill is designedly narrow (it is generally not to change the effect of the law revised) but it will deal with a matter within the subject area and expertise of the subject select committee concerned. However, we should not forget Richard Heaton's suggestion, that "Parliamentarians … are generally in politics to reform the law, not to restate it".[63] The scrutiny will focus on whether revision powers have been exceeded, and have otherwise been used appropriately, both matters that the certifiers must already have been satisfied about in order to have certified the revision Bill for introduction. So the focus is on whether the Bill makes any unauthorised changes, and on whether can it be improved as a revision. These are the kinds of matters that pre-introduction consultation (say, on exposure drafts) should do much to help identify and resolve.

It remains to be seen how enthusiastic is select committee scrutiny of revision Bills. A sceptic might think of Sir Geoffrey Palmer QC's remark (in respect of Bills making policy changes, no less) that

> It is doubtful whether many members of Parliament actually read the Bills closely, although they are responsible for passing them into law. I recall, when I was an MP, one member promising on being elected to read all the Bills. I doubt that he did.[64]

However, that may well be too pessimistic and unfair an assessment. A clear counter-example, discussed further below, is the close technical scrutiny that the Government Administration Select Committee gave in 2011 to the Statutes Amendment Bill (No 2) 2011 amendments to the *Wills Act 2007*, after having heard submitters' evidence and received officials' advice.

[62] A specialist committee was favoured by the Law Commission and by the Regulations Review Committee *Legislation Bill 2010* (162—2) pp 2−3.

[63] Richard Heaton, "Making the law easier for users: the role of statutes" (14 October 2013 IALS Speech): https://www.gov.uk/government/speeches/making-the-law-easier-for-users-the-role-of-statutes--2.

[64] Sir Geoffrey Palmer QC "There should be a law against it" *NZ Listener* (7 February 2015) 27 at 29.

Risk 4

Unintended consequences of rewriting to improve form but not alter effect are surely a risk but, one would hope, one that can, with all due care, be minimised. Several examples are discussed here: the *Wills Act 2007*,[65] a series of Acts dealing with contracts, and *Income Tax Acts*.

Wills Act 2007

This Act has been identified as an example of unintended consequences resulting from revision. The Government Administration Committee's 6 July 2011 report on the Statutes Amendment Bill (No 2) 2011 says (report, pp 1 and 2),

> when the *Wills Act 2007* was passed the main policy intention was that it carry forward, in plain language, the formalities contained in its predecessor, the *Wills Act 1837* (UK)…. However, … the *Wills Act 2007* may have unintentionally imposed two new requirements.

This resulted in amendment by way of a Statutes Amendment Bill that (as the Committee, in the same report, added at p 2) was "correcting the unintended effects of the changes that have been made by the 2007 Act. There has been no change to the policy intent."

The unintended consequences arose from transitional provisions that applied the 2007 Act to wills made before it came into force. The thinking was that the benefits of the rewriting in the 2007 Act should not be confined to new wills, especially given the ambulatory nature of wills (their taking effect only on the will maker's death).[66] This highlights a key transitional choice:

Option 1

The new law applies to new wills only (the old law continues for pre-existing wills).

Wills made before 1 November 2007	**Wills made after 31 October 2007**
Governed by *Wills Act 1837* (UK) (as amended, and as modified, as part of the laws of New Zealand)	Governed by *Wills Act 2007*

[65] 2007, No. 36.

[66] Compare, for example, some of the contracts statutes being revised. The *Contractual Mistakes Act 1977*, s 12, ensures that Act applies only to contracts entered into after that Act's commencement. The *Contractual Remedies Act 1979*, s 16 is to similar effect, as is the *Contracts (Privity) Act 1982*, s 15. Compare the *Frustrated Contracts Act 1944*, s 4(1), which ensures that the Act applies to contracts made before or after commencement, but only if time of discharge is after commencement. The *Illegal Contracts Act 1970*, s 10, ensures that Act (except s 6—Illegal contracts to be of no effect) applies to contracts whether made before or after that Act's commencement.

Option 2

The new law applies (after 31 October 2007) to both new wills *and* pre-existing wills.

Wills made before 1 November 2007	**Wills made after 31 October 2007**
Governed by *Wills Act 2007*	Governed by *Wills Act 2007*

The *Wills Act 2007*, section 40, aimed to ensure, for a will made before 1 November 2007, that the substance of the law in force at the time of the will was made would continue to apply to the will. Aspects of the 2007 Act that correspond to pre-1 November 2007 amendments to, or modifications of, the UK *Wills Act 1837*[67] (which was part of the laws of New Zealand) apply only to the same wills as the amendments or modifications applied to before their repeal. However, in carrying forward the formalities for making a will, the Government Administration select committee's report concluded in 2011 that the *Wills Act 2007*, section 11 "may have unintentionally imposed two new requirements".[68]

The 2012 remedial amendment of the *Wills Act 2007* was a valuable exercise highlighting the difficulties that can arise.[69] The New Zealand PCO will take appropriate care during the drafting and pre-introduction scrutiny of revision Bills to reduce the risk of similar problems arising. The first programme targets 18 Acts, in marked contrast to the 1908 exercise when nearly all New Zealand's statutes were revised, consolidated and repealed at once. The New Zealand PCO will welcome scrutiny of revision Bills from the legal profession and the public.

Contracts Acts

The contracts Acts revised in the Contracts and Commercial Bill include—

- provisions that have sparked significant academic controversy;[70] and

[67] 1837, c. 26 (UK).

[68] Section 11 does not say that a will-maker may first sign the will and subsequently, when the witnesses are present, acknowledge that the signature on the will is the will-maker's own. Under the 1837 Act it was possible for a will-maker to acknowledge a pre-existing signature in front of the witnesses, but section 11 does not carry forward the wording in section 9 of the 1837 Act. In addition, section 11 could be interpreted to require the witnesses to make a statement, known as an attestation clause, on the will, rather than just sign it. An attestation clause was not required under the 1837 Act.: Statutes Amendment Bill (No 2) (271—2) 2011 (reported 6 Jul 2011), 1 at 2.

[69] Peart and Kelly, "The scope of the validation power in the Wills Act 2007" [2013] NZ Law Rev 73 at 75−78: "thankfully, the errors in the restatement . . . have been remedied". The details are recorded in the Statutes Amendment Bill (No 2) (271—2) 2011 (reported 6 Jul 2011), 1−4: available at http://www.legislation.govt.nz/bill/government/2011/0271/latest/DLM3859100.html. See also SR 2012/409 and *Estate of Leith* [2012] NZHC 1190, per MacKenzie J. Compare the error-correction power in s 31 of the 2007 Act, discussed by Gendall J in *Estate of Haldane* [2015] NZHC 352. Atkin (2008) 6 NZFLJ 1 thinks the Wills Act 2007 and related changes were piecemeal, and deferred full inheritance reform.

[70] On the *Contractual Mistakes Act 1977*, s 5 (Act to be a Code), for example, see Nigel Jamieson's analysis, "Codes, Contracts, and Commerce: Taking the Heat Out of the *Contractual Mistakes Act*" (2010) 31(1) *Stat LR* 47 and (2010) 31(2) *Stat LR* 107.

- provisions that are the subject of developing case law.[71]

Accordingly, that Bill will need to deal appropriately, and quite possibly differently, with both kinds of provisions. Academic debate by itself (without uncertainty in operation, or uncertain case law) might not justify the revision Bill aiming to clarify current effect. And where the case law is uncertain, two approaches seem available, but each is potentially open to criticism. One is to maintain scrupulous neutrality by retaining the wording that is the basis of the controversy or developing case law.[72] Another is to adopt, clearly and openly, new wording that seeks to resolve the controversy by either or both: (a) reflecting exactly in the new Act the current but developing case law; or (b) making in the new Act "minor amendments to clarify Parliament's intent, or reconcile inconsistencies between provisions" as a paragraph 31(2)(i) exception to the rule that revision Bills do *not* change the effect of the law revised. Of course, that is a very narrow exception to the general rule in subsections 31(3) and 35); so it is unlikely to enable resolution of major substantive policy controversies.

An example relates to the Supreme Court of New Zealand's decision[73] on the limited role of the *Door to Door Sales Act 1967*, subsection 12(2), which cannot be revised as it was repealed on 17 June 2014.[74] Should this case's effect be reflected in a revision Act? Arguably yes, clearly and openly. Of course, the revision Bill certifiers would have to be satisfied that the Bill as drafted complies with paragraph 33(3)(b) of the *Legislation Act 2012* by not changing the effect of the law except as authorised. But if the effect of the Bill is simply to adopt, clearly and openly, the current highest case law authority, it is likely impossible to argue that the Bill *changes* the effect of the law. Of course, adoption of that case law authority might preclude further uncertainty or development (say, future reversal) of the current highest case law authority. This raises fascinating issues about the interplay of the judiciary and the legislature.

Not all uncertainties in revision arise from case law or commentary indicating there is no settled position. Some arise from grouping in a new Act provisions with subtle but

[71] "[T]he first-up candidates for the Revision Bill treatment are far from being in a state of legal certainty. See, for instance the Supreme Court's recent decision on the interpretation of the Contractual Remedies Act in *Kumar v Station Properties* [[2014] NZSC 146], which added to the jurisprudence on essentiality of contractual terms. This puts a heavy responsibility on the PCO accurately to anticipate legislation's meaning, the case law on which is still developing": Chapman Tripp *Brief Counsel—Revision Bill programme for 2015 to 2017* (19 December 2014): http://www.chapmantripp.com/publications/Pages/Revision-Bill-programme-for-2015-to-2017.aspx.

[72] Preserving existing wording if there is no settled position has been the approach preferred in preparing the first revision Bill – the Contracts and Commercial Bill. Notes of the current case law might of course be included – as was done in New Zealand with the 1931 reprint.

[73] *Commerce Commission v Telecom Mobile Ltd* [2006] 3 NZLR 323 (SCNZ). *Compare Fair Trading Act 1986*, ss 5C and 5D (inserted 17 June 2014).

[74] *Fair Trading Amendment Act 2013*, s 41(1)(a).

substantive differences. An example relates to the following 1977 and 1979 provisions about courts' powers to grant relief.

Provision	Power
Contractual Mistakes Act 1977, ss 6(1) and 7(3) and (5)[75]	6(1) A court may in the course of any proceedings or on application made for the purpose grant relief under section 7 to any party to a contract [in line with s 7(1)(a)-(c) and (2)]. …. 7(3) The court shall have a discretion to make such order as it thinks just and in particular, but not in limitation, it may do 1 or more of the following things: (a) declare the contract to be valid and subsisting in whole or in part or for any particular purpose: (b) cancel the contract: (c) grant relief by way of variation of the contract: (d) grant relief by way of restitution or compensation. … 7(5) The court may by any order made under this section vest any property that was the subject of the contract, or the whole or part of the consideration for the contract, in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.
Contractual Remedies Act 1979, ss 9(1), (2)(a), and (5)[76]	9(1) When a contract is cancelled by any party, the court, in any proceedings or on application made for the purpose, may from time to time if it is just and practicable to do so, make an order or orders granting relief under this section. 9(2) An order under this section may— (a) vest in any party to the proceedings, or direct any such party to transfer or assign to any other such party or to deliver to him the possession of, the whole or any part of any real or personal property that was the subject of the contract or was the whole or part of the consideration for it: … 9(5) No order shall be made under subsection (2)(a) that would have the effect of depriving a person, not being a party to the contract, of the possession of or any estate or interest in any property acquired by him in good faith and for valuable consideration.

Some of the textual, and possibly also substantive, differences are as follows:

[75] These provisions arose from the recommendations in Contracts and Commercial Law Reform Committee *Report on the effect of mistakes on contracts* (1976): available at http://www.nzlii.org/nz/other/lawreform/NZCCLRCom/1976/10.html.

[76] These provisions arose from recommendation 18.5(d) and (e) in Contracts and Commercial Law Reform Committee *Misrepresentation and breach of contract : report (revised)* [1978] NZCCLRCom 13, pp 9−10, 20−22, and 88−90: available at http://www.nzlii.org/nz/other/lawreform/NZCCLRCom/1978/13.html. (The 1978 revised report incorporates the Committee's 1967 report on the same subject.)

1977 Act, ss 6, 7(3) and (5)	1979 Act, ss 9(1), (2)(a), and (5)	Comment
Relief power *is not* exercisable expressly from time to time	Relief power *is* exercisable expressly from time to time	*Interpretation Act 1999*, s 16(1)
Use of relief power must be as court thinks just	Use of relief power must be as court thinks just and practicable	"and practicable" qualifies simply "just"
Vesting, transferring, or assigning power applies to "any property that was the subject of the contract, or the whole or part of the consideration for the contract"	Vesting, transferring, or assigning power applies to "the whole or any part of any real or personal property that was the subject of the contract or was the whole or part of the consideration for it"	Is 1977 Act ("any property that was the subject of the contract") to the same effect as the 1979 Act ("the whole or any part of any real or personal property that was the subject of the contract")?
Vesting, transferring, or assigning power *is not* expressly subject to exception for acquisition in good faith and for valuable consideration	Vesting, transferring, or assigning power *is* expressly subject to exception for acquisition in good faith and for valuable consideration	Is the exception implicit in the 1977 Act's "thinks just" idea?

If analysis suggests some of these subtle variations should be eliminated in the revision Bill, it will be a nice question whether amendments for this purpose fall within the limited revision power to "make minor amendments to clarify Parliament's intent, or reconcile inconsistencies between provisions".[77]

Under the *Legislation Act 2012*, subsection 35(2), a provision of a revision Act is not intended to change the effect of the law as expressed in the Acts or parts of the Acts repealed by and incorporated in the revision Act.[78] However, subsection 35(3) overrides subsection 35(2) by providing that a revision Act may expressly provide that a particular provision is intended to change the effect of the law. If there are differences in wording between Acts and their revision Acts that are difficult to reconcile, the approach of the courts has been to interpret the wording on the basis of its pre-revision meaning.

The presumption in section 35 of the *Legislation Act 2012* against a revision Act changing the law is to the same general effect as the courts' previous approach. But the effort and care that goes into preparation and pre-legislative scrutiny of revision Bills should help to make them clear, so limiting or avoiding the need to have recourse to the law being revised as a guide to interpretation.

Income Tax Acts

The *Income Tax Act 2007*[79] subsection ZA 3(3) (Transitional provisions: Intention of new law) has clearly influenced, and become part of, section 35 on the interpretation of revision

[77] *Legislation Act 2012*, s 31(2)(i).

[78] Revision presupposes the same effect can be achieved by new forms of words. The same premise is inherent in provisions like the Acts Interpretation Act 1901 (Aust), s 15AC (Changes to style not to affect meaning): available at http://www.comlaw.gov.au/Details/C2014C00077/Html/Text#_Toc382316369.

[79] 2007, No. 97.

Acts under the *Legislation Act 2012* Part 2, subpart 3 (Law relating to . . . revising legislation: revision Bills).

Acts that consolidate, but do not also amend, may be presumed *not* to alter the law. So predecessor provisions are sometimes used as guides in interpreting current provisions, despite Lord Wilberforce in *Farrell v Alexander* saying antecedents should be used rarely.[80] But some interpretation directions can affect that presumption and use of predecessors.

The *Income Tax Act 1994* as originally enacted was to re-enact in a reorganised form the law in the *Income Tax Act 1976* (except certain administrative provisions). The reorganisation and changes of style and language were *not* to affect the re-enacted provisions' interpretation or effect.[81] Yet in *NZ Ostrich Export Company Ltd v CIR* Fogarty J in 2006 said, "[s]ection AA 1 does not stand in the way of a shift of meaning or clarification of meaning [from the *Income Tax Act 1976*] as a result of the enactment of the *Income Tax Act 1994*."[82] By contrast, in *BNZ Investments Ltd v CIR*, McGrath J in 2008 treated corresponding provisions and directions in the *Tax Administration Act 1994*'s long Title and section 2 as meaning, "where the legislature has retained the original wording, all other things being neutral, the presumption will be that no change to the law was intended by the enactment."[83]

The *Income Tax Act 2004* subsections YA 3(4) and (5), and the *Income Tax Act 2007* subsections ZA 3(4) and (5), specified when the old law was an interpretation guide, and made clear that the old law is not an interpretation guide for identified policy changes with only prospective effect.[84]

The case of *Foodstuffs (Wellington) Co-op Society Ltd v CIR* shows—

- that sometimes successor provisions will be called in aid in interpreting predecessors; and also
- that courts sometimes don't accept as definitive provisions that identify what new sections change the law.[85]

[80] *Farrell v Alexander* [1977] AC 59 at 72–73 (HL) per Lord Wilberforce: "self-contained statutes, whether consolidating previous law, or doing so with amendments, should be interpreted, if reasonably possible, without recourse to antecedents . . . recourse should only be had where there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve".

[81] *Income Tax Act 1994*, s AA 1(1) and (2).

[82] HC INV CIV 2005-425-000491 21 March 2006 at [15] per Fogarty J. Fogarty J said at [15] "The definitions of net loss and available net loss will be referred to shortly. But it is important to recognise at the outset that the introduction of these provisions may be different from the re-organisation of existing provisions and changes of style and language contained in the *Income Tax Act 1976*."

[83] *BNZ Investments Ltd v CIR* [2008] 2 NZLR 709 (SCNZ) at [31] per McGrath J.

[84] See also the helpful comparative tables of old and new provisions in the *Income Tax Act 2004* s YA 6 and Sch 23 and *Income Tax Act 2007* s ZA 6 and Sch 52. Those 2 schedules "must not be interpreted as a definitive guide to the correspondence of provisions".

[85] *Foodstuffs (Wellington) Co-op Society Ltd v CIR* (HC, Wgtn, CIV 2009-485-1224, 28 October 2009).

The *Foodstuffs* case was about whether the *Income Tax Act 1994* section GD 1 requires a disposition of trading stock at less than market value to have involved both a transferor *and* a transferee in order for section GD 1 to apply, deeming the disposition to have been one at market value and to have been gross income of the transferor. In other words, can section GD 1 apply when there is no recipient of the trading stock? Foodstuffs in late 2003 acquired for $2.3m all the shares in North Island Dairy Co Holdings Ltd. It did so intending to amalgamate that company with three others into one unit. It did this, and Kapiti Fine Foods Ltd emerged as the new entity. The amalgamation formally occurred on 1 January 2004, at which point the shares of North Island Co Holdings Ltd ceased to exist.
By operation of the amalgamation, they were cancelled. The form of amalgamation that was used requires that no consideration or payment is to be made in relation to the cancelling of the shares, and none was. In its tax return for the year ending March 2004, Foodstuffs claimed as a deduction the $2.3 m purchase price of this trading stock (defined in s CD 4 as "any real or personal property . . . acquired by the [taxpayer] for sale or other disposal"). Foodstuffs did not have an equivalent $2.3m income entry attaching to the disposal of the shares by amalgamation. Counsel for Foodstuffs argued that s GD 1 did not apply to the disposal of the shares (and deem their market value to be income of Foodstuffs) because paragraph GD 1(1)(c) referred to "the person acquiring the trading stock", and so section GD 1 required both a transferor and a transferee.

Simon France J asked counsel for Foodstuffs why, if "disposal" or "a disposition" in the *Income Tax Act 1994* section GD 1 meant only "transfer", it did not use that word or concept? Counsel noted that the corresponding section GC 1 of the *Income Tax Act 2007*[86] did use the labels "transferor" and "transferee", as section GC 1 does not apply unless a person (the **transferor**) disposes of trading stock to another person (the **transferee**). Counsel for the Commissioner of Inland Revenue said in reply[87] that—

> (a) "it is not permissible to interpret the previous provisions [(ITA 1994 section GD 1)] by regard to the new [(ITA 2007 section GC 1)], and the rule in [the ITA 2007] subsections ZA 3[(3) to (5)] is that the old clarifies any ambiguity in the new, not vice versa"; and
>
> (b) the ITA 2007 section GC 1 "is a mistake that needs fixing".

There was also discussion of whether the *Income Tax Act 1994* paragraphs GD 1(a) and (c) could operate independently or only cumulatively. Independent operation of these

[86] As in force on and after 1 April 2008, until on 7 September 2010 replaced (with effect on 1 April 2008) by the Taxation (Annual Rates, Trans-Tasman Savings Portability, KiwiSaver, and Remedial Matters) Act 2010, s 54(1). Other situations where the ITA 2007 has been suggested to have made unidentified changes to the law in the ITA 1994 are discussed by Margaret Nixon, "How to confuse associated persons" *NZLawyer*, issue 96, 5 September 2008, and by Margaret Nixon, "RAP-ing with the ITAs" *NZLawyer*, issue 104, 23 January 2009.

[87] (HC, Wgtn, CIV 2009-485-1224, 28 October 2009) at [23].

paragraphs was said to be supported by the use of colons, as a colon is a punctuation mark used by IRD to show independent operation, neither disjunction nor conjunction.[88]

Simon France J held that the *Income Tax Act 1994* section GD 1 applies and operates even if a disposition of trading stock at less than market value does *not* involve both a transferor and a transferee. But the Judge added that, even though the *Income Tax Act 2007* section GC 1 was *not* included in the [*Income Tax Act 2007* section ZA 6 and Sch 52] list of sections intended to effect a substantive change to the *Income Tax Act 1994*, and was "perceived only as a plain English version of" the *Income Tax Act 1994* section GD 1,

> I cannot ignore that the wording of the 2007 Act either means I am wrong in my conclusions, or the drafters made the same mistake that the taxpayer has (the "same mistake" being simply that the 1994 Act requires a transferee).[89]

But given the *Income Tax Act 1994* section GD 1 was unsettled, and that the *Income Tax Act 2007* section GC 1 mistook its scope, the Judge thought it wrong to penalise, and so quashed the penalty imposed on Foodstuffs.[90]

So the successor 2007 section did *not* control the meaning of the 1994 predecessor section, but the *Income Tax Act 2007* section ZA 6 and Sch 52 list of sections intended to effect a substantive change to the *Income Tax Act 1994* was also *not* accepted as definitive. So a revision Act provision saying expressly that a particular provision of that Act is intended to change the effect of the law revised will not necessarily be accepted as definitive on whether that provision has done so.

As has been noted by some commentators, if there is, or may be, a mismatch between the law being revised and the revision Act, the interpreting court faces difficulty:

> revision Acts may disturb the accepted relationship between Parliament and the courts. It is the courts' role to interpret Parliament's intention. But the revision process gives Parliament the opportunity to reassert what it says its intention was all along, irrespective of what the courts may have said. . . . what is a court to do when faced with new legislation that is irreconcilable with the old? No palatable compromise seems available – either the new legislation is to be construed as consistent with the old, which undermines the intention of the former; or the new legislation is to be given primacy over the old, which guts the latter.[91]

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[88] See *IRD Tax Information Bulletin: Vol 17, No 1 (February 2005)* at 89 (Drafting convention for lists of paragraphs): available at http://www.ird.govt.nz/resources/7/6/76d457004bbe419eaa5bfabc87554a30/new-legislation.pdf. See also Alan Walker, "IRD's punctuation passion" [2007] NZLJ 331.

[89] HC, Wgtn, CIV 2009-485-1224, 28 October 2009 at [36].

[90] HC, Wgtn, CIV 2009-485-1224, 28 October 2009 at [35] to [37].

[91] Chapman Tripp *Brief Counsel—Revision Bill programme for 2015 to 2017* (19 December 2014): available at http://www.chapmantripp.com/publications/Pages/Revision-Bill-programme-for-2015-to-2017.aspx.

That comment is, however, exaggerated. Parliament is unlikely to use a revision Bill or revision Act "to reassert what it says its intention was all along, *irrespective of what the courts may have said*" (*emphasis added*). Revision's purpose is generally *not* to change the effect of the law – even, and especially, if that effect is disputed. A reassertion of that kind is better done by way of a substantive re-enactment, and one that is at the least prospective and declaratory, and may (instead of being prospective) have expressly backdated effect – albeit with any appropriate saving for existing proceedings.[92] The revision process has many checks designed to avoid or reduce the scope for a mismatch between the law being revised and the revision Act. These checks should generally work but, even if (rarely) they do not, the courts can be expected to strain the revision Act to ensure it preserves legal continuity. Even if a strained meaning is unavailable, a meaning may still be available rectifying an obvious drafting error.[93] As a last resort, the revision Act may have to be given a meaning changing the law. But, even then, it might well itself be amended to correct this unintended effect.[94]

Conclusion

It is surely "too early to say" whether modern systemic programmes of revision of New Zealand statute law will live up to their very considerable promise. But even bare reprint renumbering might help users a great deal.[95]

Improvement of the form and expression of legislation has been a key purpose of cadres of specialist legislative counsel ever since their inception.[96] Revision Bills in New Zealand are

[92] See Legislation Amendment Bill 2014 (213—1) cl 6, new s 36S(1)(c), and PCO *Interpretation Act 1999: A discussion paper* (2013) at [2.43]–[2.54]: available at http://www.pco.parliament.govt.nz/interpretation-act-discussion-paper/.

[93] As, for example, in *Inco Europe Ltd v First Choice Distribution* [2000] 2 All ER 109 (HL), and the other cases discussed in Carter, "Statutory Interpretation and the Rectification of Drafting Errors" [2012] NZ Law Rev 207. See also *Taylor v Owners – Strata Plan No 11564* (2014) 306 ALR 547 (HCA) and other Australian authorities analysed by Lumb and Christensen, "Reading words into statutes: When Homer nods" (2014) 88 ALJ 661. Recent examples of use of *Inco Europe* in the UK include *Davies v Scottish Commission for the Regulation of Care* [2013] UKSC 12; *Pollen Estate Trustee Company Ltd v Revenue and Customs Commissioners* [2013] 3 All ER 742 (CA); and *Jessemey v Rowstock Ltd* [2014] 1 WLR 3615 (CA). See also, in New Zealand, *P v F* [2015] NZCA 317 at [25] per Harrison J ("filling gaps" only appropriate if new legislation has failed to foresee and provide for particular facts), citing *Attorney-General v Spencer* [2015] NZCA 143 at [84] and n 67 per Harrison J ("if the words have not achieved the result which its promoters intended the courts should not seek to fill the gaps as a means of dealing with inadequate drafting").

[94] Note also Greenberg and Davies, above n. 14 at 43, para [23]: "We therefore recommend that it should be possible for what are, in effect, inadvertences to be remedied through the use of subsidiary legislation as part of the ongoing revision process".

[95] Reprint renumbering is authorised by Orders under the *Legislation Act 2012*, s 25(1)(b) and (2).

[96] See, for example, Bowers "Victorian Reforms in Legislative Drafting" (1980) 48 Legal History Review 329, especially the Appendix ("A chronological summary of the principal governmental activity in statutory reform 1796-1889"), noting the 1857 Commission was terminated by resolution of the House and so submitted no formal report but many of its recommendations – including establishment in 1869 of the office of Parliamentary Counsel to the Treasury – were implemented in the 18 years that passed before its investigations were resumed by another select committee, in 1875.

a new weapon in the armoury in the fight against archaism and unintelligibility (legislation that is outdated, and hard to understand). But only some of the familiar techniques legislative counsel use in that fight will be available in the context of revision Bills. For example,—

- a revision Bill might use the language "a person of the Roman Catholic faith" in preference to the pejorative archaism "a Papist";[97] but
- a revision Bill may not be able to take account fully of new technology, for example, by using medium neutral terms (for example, 'communication' rather than 'printing').[98]

In the New Zealand statute book some of the areas most in need of updating and replacement (but possibly not candidates for revision Bills) are—

- the remaining Imperial Acts and Imperial subordinate legislation that is part of the law of New Zealand (a "worklist" is set out in Schedule 1 of the *Imperial Laws Application Act 1988*[99]); and
- complex, and heavily amended, or gratuitously repetitive or scattered, provisions, examples of which might be—
  - provisions ensuring subordinate legislation lapses unless confirmed by Act of Parliament;[100]
  - provisions on infringement offences;[101]

[97] Compare *Royal Succession Act 2013* (NZ), ss 6 (new language) and 11 (old language).

[98] Compare *Parliamentary Privilege Act 2014*, ss 5(1) and (2) and Part 3 (Communicating proceedings in *Parliament) and Legislature Amendment Act 1992* (repealed) and *Defamation Act 1992*, ss 16(1), (3), 17, 19, Schedule 1 Part 1 cls 1 to 3 (repealed). See also the typically insightful analysis of Geoff Lawn "Achieving technological neutrality in drafting legislation" (2014-1 *The Loophole* 29−65:. He explores many developments, including New Zealand's Judicature Modernisation Bill 2013, Part 5. It includes, in cl 472, a principle that "all persons should be able to deal with courts and tribunals in a technology-neutral way".

[99] 1988 No. 112.

[100] See Carter, McHerron, and Malone *Subordinate Legislation in New Zealand* (Lexis Nexis NZ Ltd: Wellington, 2013) at [8.2.2]:

> The law would be more accessible if all confirmation provisions were re-enacted in one Act that could be cross-referred to in each Act that empowers the making of [confirmable instruments]. That is a statute-book-wide reform that should be considered.

[101] The complexities of the repetitive but varying provisions on infringement offences are shown by *Down v R (on appeal from Wallace Corporation v Waikato Regional Council)* [2012] 2 NZLR 585 (SCNZ). The Commonwealth of Australia has helped to address complexity of its statute book through the use of Acts of general application and standard precedents. The Commonwealth Office of Parliamentary Counsel has approached this through a single Act of general application to deal with monitoring, investigation and enforcement, which has resulted in the enactment of the *Regulatory Powers (Standard Provisions) Act 2014* (Commonwealth). Notably the etymology of "cliché" is typographical – a pre-prepared block of text – so reminding us of the late Francis Bennion's idea of standard and reusable "prefabricated law". He said, "Acts …make little use of …prefabricated law...There are thus often endless variations … (for example, powers of entry or procedure for the service of notices) instead of a single uniform provision[,] applying in all cases": see "Some Suggestions on the Form and Publication of Statute Law", 28 May 1966 at 3, available at http://www.francisbennion.com/pdfs/fb/1966/1966-001-some-suggestions.pdf.

- spent laws that should be identified and eliminated by repeals.[102]

In technical areas, there may be little political pressure for, or interest in, revision. But a neglected statute book can easily become unfit for contemporary purposes.[103]

Appendix 1 – Reform, by re-enactment, of New Zealand's auctioneering legislation

Old law (*Auctioneers Act 1928*)	**New law (*Auctioneers Act 2013*)**
Applications to be licensed as an auctioneer had to be made to a District Court. Historically, Courts would have local knowledge about applicants, so could operate licensing. Modern Courts just consider papers presented; this was a poor use of scarce Court resources.[104]	Occupational registration of auctioneers is dealt with by a Registrar appointed by the chief executive of a department of State (MBIE). Only appeals (against refusals of registration) are dealt with by a District Court.
Sale by auction was unlawful unless authorised (eg, via licence), and it was defined as selling by **outcry**, an archaic term. **Outcry** was defined to include any request, inducement, **puff**, device, or incitement made or used by means of signs, speech, or otherwise **in the presence of not less than 6 people** by any person for the purpose of selling any property offered or available for sale, whether such property is or is not	New definition of **auction** is based on a process in which property is offered for sale by an auctioneer on behalf of a vendor, and— (a) bids for the property are placed with the auctioneer "in real time" [(a modern label)], whether in person*, by telephone, via the Internet, or by any other means* [(so the definition uses medium neutral words)] and (b) the property is sold when the auctioneer so indicates

[102] Spent laws may include local and private legislation. The late Sir Ivor Richardson, "Private Acts of Parliament" (2010) 41 VUWLR 653 at 657−658 notes that

> Following the abolition of the provinces in 1876 the *Repeals Act 1878* repealed 13 of the extant Private Acts … [and] … In anticipation of the 1908 consolidation of statutes prepared by the Commissioners appointed under the *Reprint of Statutes Act 1895*, the General Assembly enacted the *Statutes Repeal Act 1907*… By s 2 the enactments and parts of enactments described in the Schedule were thereby repealed. The Schedule lists 14 Private Acts as wholly repealed and 14 as repealed as to part.

Compare, more recently, the *Regulatory Reform (Revocations) Order 2011* and the *Regulatory Reform (Repeals) Act 2012*. See also the *Statute Law Revision Act (No 1) 2014* (Aust), s 3 and Schs 7−10. The *Statute Law (Repeals) Act 2013* (UK) is the largest developed by the Law Commissions of England and Wales, and of Scotland. It repealed 817 whole Acts, and part repealed 50 other Acts. The earliest repeal was from around 1322.

[103] Areas for possible improvement include complexity and user-testing. See, for example, Office of Parliamentary Counsel (Canberra) *Reducing complexity in legislation* (17 May 2011), and Office of Parliamentary Counsel (London) *When Laws Become Too Complex* (March 2013), the latter report being part of the "Good Law" initiative started in 2013. See also the research by National Archives in the UK on "Big Data for Law", which is exploring statute-book-wide patterns identified as 'good design' based on evidence about how useful and effective they are. Compare the analysis of the law of the European Union – Marios Koniaris, Ioannis Anagnostopoulos, Yannis Vassiliou, "Network Analysis in the Legal Domain: A complex model for European Union legal sources".

[104] *Consumer Law Reform – A Discussion Paper* (June 2010),) at 88. Stipendiary Magistrates were on 1 April 1980 replaced by District Court Judges (District Courts Amendment Act 1979) – this update was shown in online reprints, but was not a textual amendment. This table is informed by insightful analysis of these issues in W A (Bill) Moore's paper for the New Zealand Bar Association's August 2012 Annual Conference, Melbourne, Australia.

the same as that shown or referred to by him when making or using such request, inducement, **puff**, device, or incitement **Puff** was also an archaic term. The requirement to be in the presence of people did not fit with online auctions, or with auction processes done by people together with some bidder(s) participating by phone or Internet. These definitions were also not linked to and used in related consumer laws.	But a process described as an Internet auction, but that provides that any contract of sale resulting from the process is a contract directly between the winner of the bidding and the seller of the property, is not an **auction**. This excludes "buy now" arrangements that arise from Internet bidding. Online auctions are covered although involving multiple locations (even overseas locations, so long as what is sold is supplied in New Zealand). Definitions are linked to and also used in related consumer laws.
Licensing could be limited to sparsely-populated **special districts**, boundaries to which were defined by regulations. This presupposed auctions occurring just in one physical location. This premise failed to account (even in the 1920s) for telephone bidding, and did not cover online auctions conducted at multiple locations.	Licensing allows licensee to carry on business anywhere in New Zealand as an auctioneer. **Auction** is defined to cover online auctions (which, by definition, involve multiple locations).
Maximum penalties were clearly inadequate and made offences not worth prosecuting (for example, a $200 maximum fine for unlicensed auctioneering).	Maximum penalties are updated (for example, $10,000 individual and $30,000 other people fines for unlicensed auctioneering)

Appendix 2 – Enhancing accessibility of out-of-date laws: Summary of New Zealand's efforts

Effort	Description
1850 reprint	Done by — Hon Alfred Domett, Journalist, politician, public servant, premier, writer[105] Process — Collection of Ordinances and Amendments and Imperial Acts Product — Reprint of laws 1841−1849 (Legislative Council's first 10 sessions) Format — Hard copies – single separate volume
1879 revisions	Done by — Commissioners under *Revision of Statutes Act 1879* (which replaced proposal under *Reprint of Statutes Act 1878*) (Justice Johnston, Solicitor-General Reid, Draftsman Curnin) Process — Revision powers exercised via Consolidation Bills Product — Bills enacted from 1880 to 1886[106]

[105] Hon Alfred Domett (1811–1887): see The Encyclopedia of New Zealand, Biographies.

[106] *New Zealand's Criminal Code Act 1893*, predecessor of New Zealand's current *Crimes Act 1961*, resulted from codification efforts including a June 1883 report of the Statute Revision Commission – (1883) AJHR A.9. This work was based on James Stephen's third draft, the 1880 UK Bill: France and Pike, *Laws NZ – Criminal Law*, (LexisNexis NZ Ltd, 2015), para 1; White, "The Making of the New Zealand Criminal

Effort	Description
	Format — Hard copies – printed as part of annual volumes of Acts
1885 and 1892 reprints	Done by — Wilfred Badger, Barrister and Solicitor Process — Funded by public subscription Product — Reprint in 1895 (2nd edition in 1892) Format — Hard copies – two separate volumes
1902–1908 compilations	Done by — Solicitors-General (Reid, Fitchett) as directed (by both Houses of General Assembly) under *Statutes Compilation Acts 1902, 1908* Process — Original and amending Acts are embodied in Compilation Bills Product — Bills enacted from 1902 to 1906 (eg, *Education Act 1904*) Format — Hard copies – printed as part of annual volumes of Acts
1908 re-enactment	Done by — Commissioners under *Reprint of Statutes Act 1895* (1903–1908, Chief Justice Stout, Solicitors-General Fitchett and Reid) Process — Revision powers exercised via Consolidated Statutes Enactment Bill (replacing 806 existing Acts with 208 new revised Acts – but excludes Imperial, local, provincial, private, and native land Acts) Product — *Consolidated Statutes Enactment Act 1908* Format — Hard copies – separate printed volumes
1909 native land revision	Done by — Counsel to the Law Drafting Office (Salmond) with help from conclusions of Stout-Ngata Commission of 1907-8 Process — Ordinary Bill of 400 clauses consolidating and reconciling contradictory provisions of 69 Acts or parts of Acts Product — *Native Land Act 1909* Format — Hard copies – printed as part of annual volumes of Acts
1920 compilations	Done by — Compilation department of LDO under Statutes Drafting and Compilation Act 1920 (F R Chapman, J Christie), which replaced ("entirely failed") Amendments Incorporation Act 1913 Process — Compilation Bills that consolidate and amend Product — Bills enacted in 1920s (eg, *Electoral Act 1927*) Format — Hard copies – printed as part of annual volumes of Acts
1931 reprint	Done by — Government and Butterworths (now LexisNexis) Ltd Process — Certified by Attorney-General under Reprint of Statutes Act 1931 so as to require judicial notice to be taken of, and apply Evidence Act 1908, s 29 authenticity presumptions to, reprint [107] Product — 9 volumes of *1931 Public Acts of New Zealand (Reprint)* 816 principal Acts (+ 831-page index) Format — Hard copies – separate printed volumes
1936 Statutes Amendment Bills (SABs) begin	Done by — LDO under *Statutes Drafting and Compilation Act 1920* and PCO under *Legislation Act 2012* Process — Omnibus Bill making minor amendments to existing Acts[108]

Code Act of 1893: A Sketch" (1986) 16 VUWLR 353; Palmer, **]** "The Reform of the Crimes Act 1961" (1990) 20 VUWLR 9.

[107] Only with the *Evidence Act 1908* s 29A (inserted by the Acts and *Regulations Publication Act 1989*, s 23) did similar presumptions apply to later reprints. See also the *Acts and Regulations Publication Act 1989*, s16D (inserted in 2007), and now the *Legislation Act 2012*, s 18.

Effort	Description
	Product — (usually divided separate) Acts amending existing Acts Format — Printed and electronic copies – in annual volumes and compiled
1957 reprint	Done by — Government – Compilation department of LDO under *Statutes Drafting and Compilation Act 1920* (especially H Turnbull) Process — Reprints incorporating amendments as at stated date Product — 16 volumes of *NZ Statutes Reprint (1908–1957)* 423 principal Acts Format — Hard copies – separate printed volumes
1957–1979 official reprints	Done by — Compilation department of LDO/PCO under Statutes Drafting and Compilation Act 1920 (especially H Turnbull) Process — Administrative compilation or reprinting Product — reprints of 165 Acts with their amendments 'as at' stated dates (in contrast, 220 sets of regulations were reprinted 1936–2002) Format — Hard copies – printed as part of annual volumes of Acts
1976 Income Tax Act	Done by — Bill drafting department of PCO under Statutes Drafting and Compilation Act 1920 Process — Consolidation and revision of Land and *Income Tax Act 1954* (and amendments and annual taxing Acts since 1954) Product — *Income Tax Act 1976*, and *Land Tax Act 1976*[109] Format — Hard copies – printed as part of annual volumes of Acts
1979–2003 rolling reprint	Done by — Compilation department of LDO/PCO under Statutes Drafting and Compilation Act 1920 (especially H Turnbull) Process — Administrative compilation or reprinting Product — 42 volumes of *Reprinted Statutes of New Zealand* - 805 Acts (some reprinted serially), including Imperial enactments in force in New Zealand, and some provincial ordinances of continuing application, with their amendments 'as at' stated dates Format — Hard copies – separate volumes (RS1–RS42)
1994 Income Tax Act	Done by — Bill drafting department of PCO under *Statutes Drafting and Compilation Act 1920* Process — reordering and renumbering of *Income Tax Act 1976* (phase 1 of 4-phase cumulative tax law rewrite[110])

[108] The first SAB dates from 1936: Christie (1937) 20(2) JCL & IL (3rd Series), 116; Martin (2004) 210–212. Dollimore (1968) 37 *The Table* 26, 27–28, says an SAB was first referred to the Statutes Revision Committee in 1939, and that reference to a Select Committee "continued with these Bills ever since". In the 1950s, Webb used separate Bills instead: McGee, "Concerning Legislative Process" (2007) 11 Otago LR 427.

[109] Land tax apparently started with the *Property Assessment Act 1879* and annual taxing Acts such as the *Property Tax Act 1879*, but was abolished with effect on and from the year of payment commencing on 1 April 1992: *Land Tax Abolition Act 1990*. But local authorities still set, assess, and collect rates to fund local government: *Local Government (Rating) Act 2002*. Estate duty was abolished in respect of deaths occurring on or after 17 December 1992: *Estate Duty Abolition Act 1993*. Gift duty was abolished in relation to a gift made on or after 1 October 2011: *Taxation (Tax Administration and Remedial Matters) Act 2011*, s 245.

[110] Writing on New Zealand's tax law rewrite process includes John Prebble, "Why is Tax Law Incomprehensible?" (1994) 4 *British Tax Review* 380; Elizabeth A McAra, "Plain Language in New Zealand Tax Legislation" (March 1997) *The Loophole* 54; Sir Kenneth Keith, "The Need to Rewrite Tax Legislation" (1997) 3(2) *New Zealand Journal of Taxation Law and Policy* 96; Margaret Nixon, "Rewriting the Income Tax Act", (2004), 52 Clarity 22); and Sir Ivor Richardson, "Simplicity in Legislative Drafting and Rewriting Tax

Effort	Description
	Product — *Income Tax Act 1994* Format — Hard copies – printed as part of annual volumes of Acts
1996 Tax law revision	Done by — Inland Revenue Department (IRD)'s Tax Law Drafting Unit[111] Process — rewriting of core provisions in Part B to give an overview of Act's scheme and purpose and change its structure (phase 2 of 4-phase cumulative tax law rewrite) Product — *Taxation (Core Provisions) Act 1996* Format — Hard copies – printed as part of annual volumes of Acts
2001 interim NZL website	Done by — Brookers for PCO Process — website built, launched, and maintained for public access to legislation pending completion of NZL website project Product — Administrative compilations or reprints Format — Electronic copies with no official status
2003–2014 official reprints	Done by — Reprints Unit of PCO under *Statutes Drafting and Compilation Act 1920* and *Legislation Act 2012* Process — Administrative compilations or reprints, including editorial changes (not changing effect of law reprinted)[112] Product — One-off official reprints according to annual programme Format — Hard copies (also posted electronically with no official status)
2004 Income Tax Act	Done by — Inland Revenue Department (IRD)'s Tax Law Drafting Unit Process — rewriting Parts A to E and Y, re-enacting Parts F to O and Schedules (phase 3 of 4-phase cumulative tax law rewrite) Product — *Income Tax Act 2004* Format — Hard copies (also posted electronically with no official status)
2007 Income Tax Act	Done by — Inland Revenue Department (IRD)'s Tax Law Drafting Unit Process — rewriting of Parts F to O and Schedules (phase 4 of 4-phase cumulative tax law rewrite) Product — *Income Tax Act 2007* Format — Hard copies (also posted electronically with no official status)
2008 NZL website	Done by — Publication Unit and Reprints Unit of PCO under Statutes Drafting and Compilation Act 1920 and Legislation Act 2012 Process — Administrative compilations or reprints, including editorial changes, and "officialisation" checking of pre-2007 legacy data

Legislation" (2012) 43 VUWLR 517). See also Rogers, "Drafting Legislation at the Tax Law Rewrite Project" in Stefanou and Xanthaki (eds) *Drafting Legislation—A Modern Approach* (Ashgate, 2008), ch 6; Adrian Sawyer, "New Zealand's tax rewrite programme – in pursuit of the (elusive) goal of simplicity" (2007) 4 *British Tax Review* 405; and Adrian Sawyer, "Rewriting Tax Legislation – Can Polishing Silver Really Turn it into Gold?" (Paper for Australasian Tax Teachers Association 25th Annual Conference, 23-25 Jan 2013, University of Auckland).

[111] *Statutes Drafting and Compilation Act 1920*, s 8A (inserted 1995), and SR 1995/286. See also (NZLC R107, 2009) at ch 7, recommending a change, and the *Government response* (29 Nov 2009) at [38] (keep separate IRD drafting unit but interact more with PCO). See now *Legislation Act 2012*, s 60.

[112] *Acts and Regulations Publication Act 1989*, ss 17A–17F (inserted 2000), giving power to make editorial changes in reprints. See now *Legislation Act 2012*, ss 24–27.

Effort	Description
	Product — NZL website – www.legislation.govt.nz Format — Electronic copies with no official status
2014 official NZL website	Done by — Publication Unit of PCO under *Legislation Act 2012* Process — Administrative compilations or reprints, including editorial changes (which are expanded to include obvious error correction and renumbering[113]) Product — NZL website – www.legislation.govt.nz Format — Electronic copies (plus print on demand) with official status[114]
2015–2017 revision programme	Done by —PCO under Legislation Act 2012 Process — Revision Bills enacted via special streamlined process Product — NZL website – www.legislation.govt.nz Format — Electronic copies (plus print on demand) with official status

[113] *Legislation Act 2012*, ss 25(1)(b) and (j) and (2).

[114] *Legislation Act 2012*, s 17, and *Legislation (Official Electronic Versions) Notice* 2014 (9 Jan 2014) *NZ Gazette* 32: See also the Attorney-General's 6 January 2014 release: "Official legislation on-line today".

Maintaining and Adapting the Role of Drafters as Keepers of the Statute Book

Robyn Hodge[1]

Abstract

This article sets out the aspects of the role of legislative drafters as keepers of the statute book, with reference to aspects of that role in New South Wales, in particular writing legislation and ensuring its cohesiveness, effectiveness and consistency.Changes in the role and in legislative drafting over the last 30 years are also described. The unique skill sets of specialist legislative drafters, including skills related to the refinement of policy, are discussed in the context of the loss of other specialist public sector policy and law-making skills. The role of legislative drafting offices in retaining quality legislation and as sources of independent advice is set out. The paper concludes that independent legislative drafting offices and specialist legislative drafters are necessary for the production of good and effective statutes.

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Introduction

Legislative drafters and others sometimes describe their role in terms of being keepers of the statute book.[2] The term, redolent of old time fusty lawyers and massive sets of statutes, has been useful to reflect the role of legislative drafters both in relation to the writing and

[1] Deputy Parliamentary Counsel, New South Wales, Australia.

[2] J Erasmus, "Keepers of the Statute Book: Lessons from the Space-Time Continuum," 2010-1 *The Loophole* 7.

maintenance of the written law and the keeping of records of that law. It is somehow mystical, and significant at the same time, particularly if you are a legislative drafter or another lawyer or writer who has come up close to the legislative process. This paper contains some reflections on the evolution and importance of that role in New South Wales (NSW) and its continuance in an age where a tide of legislation still rises and government resources are spread thinner. However, much of what is said also applies to other jurisdictions in and outside Australia.

The role

There is of course no longer a statute book in its corporeal leather bound form in NSW. The process of writing legislation and making it available has also changed out of all recognition in the last 30 years. Nonetheless, legislative drafting offices perform enduring and important functions that help to facilitate the operation of the rule of law in our democracy in writing legislation, in ensuring the cohesiveness, effectiveness and consistency of legislation, in ensuring the application of legal principles to the writing of legislation, in keeping accurate current and historical records of legislation, in publishing and maintaining authoritative versions of legislation and in providing free public access to legislation. They are also the functions encompassed by the description of keepers of the statute book. Some of these functions are the same as those that have historically been performed by legislative drafting offices, while others have been transformed or taken on by us in more recent times. The role of a skilled cohort of legislative drafters as individual keepers of the statute book is also critical to this role, in particular the examination of legislative proposals with integrity and intellectual rigour. This paper focusses on the first 2 aspects of the role, that is, writing legislation and ensuring its cohesiveness, effectiveness and consistency.

Why now?

Why is it important to consider this role? The expansion in the number of legislative drafters and better remuneration that occurred in the 1980s and 1990s in Australia, and the funding for technology, seen in the last 10 years, have been curtailed by pressure to reduce Government debt. For the last few years, governments in Australia have been reducing costs and actively seeking ways to give work formerly done by government agencies to the private sector. This has impinged on legislative drafting offices and, during the last decade in New South Wales, the issue of outsourcing at least some government legislative drafting services has been raised on more than one occasion.

At a time when the provision of services by dedicated public servants is in some cases seen as less desirable than the provision of services by the private sector, and when economic measurements are routinely applied to the provision of all government services, it is useful to restate the unique advantages and role of government drafting offices and specialist legislative drafters. Such a restatement is especially necessary because legislative drafting

offices and legislative drafters mostly operate under a cloak of public invisibility so that those functions and advantages that seem to be so obvious to legislative drafters are generally not known and are thus unappreciated in any public debate about legislative drafting and the provision of legislative drafting services. Although the lack of visibility is generally helpful because it enables the work of drafting legislation to proceed appropriately, it also causes legislative drafters and their work to be overlooked in any debate about essential government and legal services.

The lack of visibility is also apparent in terms of the general lack of recognition of legislative drafting as a legal specialisation among fellow lawyers, partly because of the relatively small numbers of legal professionals who are legislative drafters and maybe because legislative drafters do not generally form part of the private legal profession. Another aspect of dealing with the consequences of drafter invisibility is to consider whether legislative drafting offices should take action to raise the profile of legislative drafting work, and legislative drafters as specialist legal practitioners within the legal profession and among the judiciary. In NSW, we are now pursuing ways of liaising with members of the judiciary and the legal profession as a whole about the work of legislative drafters and the legal services provided by the NSW Parliamentary Counsel's Office.

Changing times or whatever happened to the olden days

The context in which legislative drafting is carried out has changed significantly during the period in which Don Colagiuri, the current NSW Parliamentary Counsel, and I have been drafting. Back in the days when we started (about 10 years apart) there was still a "statute book"—a collection of hardback leather bound volumes that contained the written law of NSW. The law had a physical existence and the metaphor of the Statute Book worked because of that. NSW had a Government Printing Office which published State legislation. Writing and publishing were quite separate activities; writing and collecting information about the status of legislation were done by the NSW Parliamentary Counsel's Office while the publication of legislation for Parliament, reprints and other material was the function of the Government Printer. The legislative drafting office had a small complement of legislative drafters, with a few editorial staff and typists and nearly all male drafters. Drafts were mostly handwritten and typed up by the female typists. Although the Parliamentary Counsel's Office wrote subordinate legislation, draft instruments were provided to the legislative drafters who then merely tidied them up. The law was written in terms of a masculine world (unless the law was about nurses).There had been an NSW legislative drafting office since 1880 in various forms and not a lot of things had disturbed the tranquil legislative pond.

Unknown to the inhabitants of this peaceful and traditional setting, change was on its way. The 20th century ushered in an explosion of legislation that has proceeded unabated in the present century. Common law has receded and been overtaken by legislative provisions. Most aspects of ordinary and economic life in NSW are subject to legislative rules. The

work of courts these days is mostly to apply and interpret statute law (though Judges and universities have been slow to acknowledge this truth).

The volume of legislation expanded from the late 1970s and continues to expand, with the flood of legislative endeavour covering some traditional but more new areas, for example, consumer protection, discrimination, competition, health, licensing, social regulation (for example, relating to drugs, alcohol and gambling), education, and the establishment of statutory corporations (later followed by the dissolution or privatisation of statutory corporations), Aboriginal land rights and the creation of new crimes and enforcement powers in response to events, notably terrorism. The topics are seemingly only limited by the constitutional limits of the State's legislative power. Legislation has become not only a means of setting out rules and proscribing behaviour, but also a means of implementing social policy and a handy first line response to any political issue of the day. This proliferation of legislation has seen an increase in the size and sophistication of legislative drafting offices in response to increased demand, and made the role of keeping the statute book even more important and more complex.

Writing good legislation and ensuring cohesive, effective and consistent legislation

The essential task as keepers of the statute book is to write good legislation and to ensure its cohesiveness, effectiveness and consistency. A description of the elements of the task of writing good legislation shows its complexity. Writing good legislation is writing laws that are effective and implement policy in legally effective terms. It also includes writing laws that are readable so that the language used and the structure of the legislation yields up its contents easily. The production of cohesive and effective legislation means placing new laws or changes to laws in an appropriate place in the statute book. It also means writing laws that are within the parameters required by the Australian Constitution and the legislative power conferred on the State. Good and effective legislation facilitates its accurate interpretation by judges and its appropriate implementation by administrators. It contains policy that has been tempered and refined by appropriate investigation and analysis and designed within a workable framework. Good legislation is generally free of systemic or regular errors and is the product of a rigorous checking and quality assurance program conducted by other legislative drafters and trained editors.

Are specialist legislative drafters necessary for good law?

As can be seen from the description of the task of writing good law, multiple legal, policy and literary skills are required in individual legislative drafters. Despite this, there seems to me to be a commonly held belief of lawyers who are not legislative drafters and non-lawyers that anyone can write legislation. This seems to be a peculiar blind spot in a profession that recognises specialisations in particular legal areas and also between (say) litigators and conveyancers. The skill of legislative drafting is not innate and is not conferred by the mere possession of a law degree or even several years of legal (non-drafting) experience. The

Honourable Justice Michael Kirby, formerly of the High Court of Australia, has described drafting public laws as "a special vocation within the profession of law."[3]

The model of the independent government drafting office staffed by Government lawyers dedicated to providing specialist legislative drafting services brings considerable advantages to State legislation and government. Not least of these is a body of legally qualified staff who specialise in writing legislation and have a deep knowledge of the whole of State legislation, an intimate knowledge of the legal and policy issues that surround the making and writing of legislation and the ability to provide objective and independent advice about current and proposed legislation.

In addition, a specialist legislative drafter has other skills acquired because of and enhanced by his or her specialisation. The former NSW Parliamentary Counsel, Dennis Murphy QC, has listed the qualities and skills that a trained and experienced specialist legislative drafter brings to legislative drafting in NSW. They include experience in policy analysis and development and problem solving, creativity in the creation of legislative schemes, the ability to tease out/fill in details of a legislative scheme, the ability to test proposals and predict future developments, elegance in language, the ability to address an audience, a deep knowledge of the State's statute law and ability to mesh proposals into State law, the ability to examine the legal context and implications of a proposal and independence and objectivity.

It takes a considerable period to gain the suite of good legislative drafting skills listed by Dennis Murphy and the potential to attain those skills is not within the reach of every lawyer. Legislative drafting skills cannot easily be attained in isolation outside a drafting office as they are skills that are best honed by doing and telling, that is, writing laws under the supervision of experienced legislative drafters. They also need to be nurtured in an environment that includes regular exposure to resolving issues relating to the refinement and implementation of proposed policies and to the whole body of law of the jurisdiction concerned, the statute book. It is no coincidence that specialist legislative drafters have been writing legislation in NSW since the 1880s and continue to do so to this day.

Policy roles and corporate memory

Some commentators on legislative drafting have discussed the role played by legislative drafters in developing and refining policy as part of their role in producing legislation. This is a substantial part of the specialist drafter's skill set referred to by Dennis Murphy. The skills relating to policy analysis and development, including the fashioning and refining of legislative schemes, make it possible for effective law to be fashioned from policy, particularly when policy is developed in haste or by inexperienced officers. They are relied on by Government instructing officers and recognised as part of the service provided by

[3] M. Kirby, "The Never-Ending Challenge of Drafting and Interpreting Statutes – a Meditation on the Career of John Finemore QC" (2012), 36 (1) *Melbourne University Law Review* 140.

legislative drafting offices and legislative drafters. This has always been an understood aspect of the drafter's role, even if it is seldom publicly acknowledged in NSW. Like other aspects of the drafter's role it continues to evolve.

A (fairly) recent example of this evolution was provided by Peter Quiggin when describing the Australian Office of Parliamentary Counsel's role in raising "complexity flags" with instructors if they consider that legislation that they are drafting will add to complexity.[4] The raising of these flags leads to an agency review of the complexity of a policy. In that case, the drafter's responsibilities (and those of the legislative drafting office) have been expressly extended to considering and drawing attention to aspects of policy that may lead to unnecessarily complex legislation. In NSW similar queries are likely to be raised on an informal basis by the Parliamentary Counsel at a whole of government level if discussions at a Departmental level do not resolve a matter. Peter Quiggin's discussion of the role of legislative drafters in refining and devising policy in the same article also provides evidence of the fact that the enhancement of the drafter's policy role is now generally recognised.

One aspect of shortening purse strings in the public sector, and in changing public sector employment practices, has been the diminishing numbers of long-serving public servants who are expert in specific administrative or policy areas. This is not to say that these expert instructing officers do not exist, they are simply not as plentiful as in the past. Anecdotally, public servants change jobs more frequently and are less prone to stay in specified areas or even the public service itself. In NSW there has been a move to generalists with flexible management skills but little deep understanding of particular policy areas. As mentioned earlier, this has led to a belief in the portability of public service skills and an enthusiasm for outsourcing. The result has been a diminution in the ability of instructing officers to provide rigour in testing and developing policy. The skills of experienced legislative drafters in fleshing out, testing and creating legislative schemes to assist policy are now more necessary than ever to create effective law.

In many cases the traditional long-serving instructing officers have been replaced by contractors and employees who are mostly still learning about the areas they (briefly) administer. The legislative drafting office, and its long-serving legislative drafters who are experienced in and authors of particular areas of State law, have gained a new role as the corporate memory of the public service. This manifests itself in using knowledge of the development and history of particular statutory provisions, and related policy, to resolve questions about particular provisions of legislation and the policy issues around legislation. It is also manifested in the reliance of Departments on the legislative drafting office to provide staff capable of carrying out this function. Legislative drafters have been able to give advice that has assisted legislation and policy to be consistent and coherent in cases where a lack of Departmental knowledge and experience would not have led to this result.

[4] P Quiggin, "Statutory Construction: How to Construct, and Construe, a Statute", Chapter 6 in *Key Issues in Judicial Review*, Neil Williams, ed. (Federation Press: Annandale, 2014).

The traditional role of keeper of the statute book has been amplified in a way that is not likely to be diminished.

Independence and integrity

A separate public service legislative drafting office also enables and mandates ethical drafting practice by legislative drafters who are not aligned with political interests and who are not providing advice or drafts in a context where gaining or retaining work or remuneration is dependent on giving the desired advice or draft. Legislation is written in an environment in which proponents of legislation (and persons directly instructing on legislation) can expect that relevant policy and legal issues will be raised in an impartial and consistent manner, that effective solutions will be provided if available and that legal principles will be applied in writing new laws.

The authority and overview provided by a legislative drafting office from which specialist legislative drafters operate enables government as a whole to be dealt with as the client of the drafter. This is especially useful where individual public sector officers or bodies, or even Ministers, are pursuing conflicting proposals or proposals that require further examination in a whole of government context. The capacity to operate with independence from other government agencies is essential to being able to offer full and independent professional advice to both an agency sponsoring legislation and the government. The provision of that advice is essential to being able to ensure that legislation is consistent and effective.

Writing good law—the idea that how we write and who we write for is important

Another aspect of the evolution of the role of legislative drafters in writing good and effective legislation has been the active engagement of legislative drafters and drafting offices in the debates on controlling the growth of legislation and on the way in which legislation is written. (As seen in the earlier discussion of the Australian Office of Parliamentary Counsel's role around complexity in legislation, sometimes these 2 themes coincide.) During the 1980s legal and other writers discovered the excitement and discipline of expressing ideas in plain language. Australian legislative drafting offices and leading legislative drafters like Dennis Murphy realised from the mid-1980s that plain language was better for the law and legal and other users of the law, not least of all the citizens who are assumed to know the law. The careful ornamentation, excessive caution and use of archaic legal expressions that characterised legislative drafting in the 1970s (at least in NSW) gave way to new ways of writing legal ideas. There was also external pressure on legislative drafting offices to take the lead in this area. One example of this was the Victorian Law Reform Commission report, *Plain English and the Law* (1987).

In the end, Australian legislative drafting offices mostly dived into a frenzy of experimentation which has mellowed into an acceptance of the need to draft clearly and

plainly. Between 1983 and 1993 the appearance of legislation changed forever as legislative drafters were given leave to experiment and the focus of legislative drafting offices turned to the usability of legislation. Recognition grew that the legal effectiveness of statute law was dependent on not only what it said but how it said it. This seemed to be an exceptionally novel idea at the time and now it seems so obvious as to be ridiculous to be even saying it in print. However, the byways and diversions of plain language as it has evolved in Australian legislative drafting, include many vestigial curiosities left in drafting styles of different jurisdictions (including my own) from the high water mark of the plain language movement, but this is a topic best left for another time.

One lasting legacy of the plain language movement for legislative drafters and drafting offices has been the acknowledgement that "keeping" the statute book is a literary task as well as a legal one. Coupled with this is recognition that the language and meaning of legislation should be easily accessible to ordinary citizens (although there are technical laws and may be other laws that are exceptions to this principle). These things are not only recognised within legislative drafting circles but outside them. The range of law impinging on the activities of citizens, and the ease of access to these laws, has brought with it a sense of public ownership of written laws. Obscurity and legalism is no longer acceptable when anyone can look up the law affecting them, (for example the rules for dog registration or motor-bike gangs) on their mobile phone. One of the constant tasks for individual legislative drafters as well as for legislative drafting offices is to keep under scrutiny the way laws are expressed. A relapse into complacency or laziness in this aspect of keeping the statute book is likely to be to the detriment both of the law and the reputation of a legislative drafting office. Keeping an effective and durable statute book requires a specialist office, and specialist legislative drafters, working in an environment that values the writing task and looks to writing law that is both accessible and effective for the purposes of the broadest range of users of the law.

In terms of writing law, "keeping" the statute book has also changed over the last 30 years to include ensuring that the law reflects changes in community views, particularly in relation to particular groups in the community. In some Commonwealth jurisdictions outside Australia this has meant the writing of laws in multiple languages. In NSW, from the mid-1980s, our Office undertook a project to gender neutralise the statute book. Until that time nearly all laws had been expressed in the masculine gender and the interpretation legislation provided that the masculine included the feminine. The exclusion of women from legislation would have seemed perfectly normal in 1902 in NSW. By 1985 it was more than an affront to half the population. And in this century as an office we are looking at the challenges of legislative drafting for intersex persons without using "her or him", a concept that would have been almost unimaginable 30 years ago.

Again, a legislative drafting office which keeps abreast of ideas, is up to date, and is representative of the community is best placed to watch over and facilitate broad legislative

adjustments of this kind. The training and development of emerging legislative drafters and the continued enthusiasm of more experienced legislative drafters for their task is also the best way to facilitate both the literary and legal task of keeping the statute book. The expression of legislation, both in terms of writers and audience, reflects a varied community – legislative drafters in NSW are no longer old white guys, they are women and men of all ages, who have backgrounds that increasingly reflect the composition of the State's population. These backgrounds and generational attitudes are reflected in the way that they draft and are important to the ongoing renewal and relevance of NSW legislation.

Quality control

Changes in technology have exposed drafters of legislation to greater scrutiny, leading to increased exposure of errors in legislation. The evolution of legislative drafting over the last 30 years has also seen an evolution in quality control and checking and increasing sophistication in editorial techniques and abilities. Editorial and quality control staff, like legislative drafters, are often long serving employees of legislative drafting offices who accrue a detailed knowledge of legislation and legislative requirements over a period of years. The existence and continuance of this cohort of staff is an important aspect of the role of a legislative drafting office as the keeper of legislation.

The implementation of rigorous and consistent quality control procedures for proposed legislation enables the writing of good legislation and the application of appropriate writing standards for legislation. In NSW editorial staff are also skilled in maintaining the legislative database and preparing and keeping records of State legislation. These are of course the other, practical limbs, of the task of being keepers of the State statute book. The existence of a public service legislative drafting office, with an ongoing remit for the quality of the statute book, facilitates the development of quality control systems for the production, publication and recording of good legislation and for the provision of access to it. It is not an outcome that can be guaranteed with multiple providers of legislative drafting services.

Technology and writing good law

It is important to note briefly the effect of technological changes on writing good law. These changes arose from changes in the act of writing and mostly gathered pace from the 1990s onwards. Manual technologies for writing, printing and incorporations were superseded. Legislative drafters who wrote drafts in longhand for typists in 1983 were typing on personal computers by 1993. The advent of the internet changed communications with fellow workers and external stakeholders, and even the public, forever.

The ability of a drafter to control text, to produce and revise drafts quickly, and to produce copies that track changes to drafts, has facilitated the production of greater quantities of legislation. This has perhaps resulted in lengthier rather than shorter legislation. It has also raised expectations that both the legislative drafter and the drafting office will respond to

policy changes or commentary on drafts within shorter time periods and account for any change to a draft. The increased ability to generate text has also contributed to some of the external assumptions that legislative drafting is a task that can be easily outsourced. The proliferation of electronic devices that are able to be connected to the internet and thus to sources of legislation has resulted in a very direct connection between the producer/publisher of NSW legislation (the legislative drafting office) and users of that legislation. The disgruntled/curious/anxious consumer of legislation is only an email away.

The production of good and effective law is also of little moment if it is not generally available and accurate. The existence of a specialised legislative drafting office in NSW has enabled new drafting and publishing technologies to be adopted and used in an innovative way. In NSW new publishing and word processing technologies have developed in a way that has facilitated the control by the legislative drafting office of the whole life cycle of legislation.

Conclusion – Maintaining our role as keepers of the statute book

As noted above, the theories and mechanisms for writing and recording law and the width of the individual drafter's task have all evolved and will continue to evolve. The basic role of legislative drafting offices, in writing, recording and giving access to statute law will also no doubt evolve alongside. As this brief discussion of the role and skill of legislative drafters and drafting offices as keepers of the statute book shows, that role is not suitable for the semi-skilled or unskilled generalists, or for a body that is not independent or objective. Nevertheless alternatives may need to be discussed if legislative drafting offices are to maintain their role as keepers of the statute book.[5]

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[5] At the 2015 CALC Conference, Don Colagiuri, NSW Parliamentary Counsel, discussed ways in which drafting offices can adapt to changing times. An article on this subject is to be published in a forthcoming issue of the *Loophole*.

Affirmative Action, Gender Equality and Increased participation for Women, Which Way for Ghana?

Estelle Matilda Appiah[1]

Abstract

This article describes the initiatives taken by the Republic of Ghana to enact an Affirmative Action (Gender Equality) Bill that is in consonance with the 1992 Fourth Republican Constitution to meet the demand for increased participation of women in governance and decision-making positions and takes into account the international obligations of the Republic of Ghana.

The article examines the strategies proposed in the context of legislation to meet the challenges of enforcement in an environment where paternalistic traditions persist. It also outlines measures to effectively redress social, economic and educational gender imbalances in Ghana, within a legal framework that seeks to remove the impediments to sustainable national development and create a situation where gender equity prevails and women have equal rights, equal responsibilities and equal access to every aspect of national life.

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International Conventions

The 1948 Universal Declaration of Human Rights,[2] the milestone document in the history of human rights, establishes a common standard of achievements for every person and every

[1] Legislative Drafting Consultant, Ghana.

nation. It sets out the fundamental human rights that are to be universally protected. The 192 member states of the UN, including the Republic of Ghana, have signed on in agreement with the Declaration and made a commitment to uphold dignity and justice for all. Article 2 of the Declaration contains a non-discrimination clause, while article 21 grants the right to everyone to take part in the government of their country, directly or through freely chosen representatives.

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[3] was adopted by the Republic of Ghana in 1979 and ratified in 1986. CEDAW has in its preamble:

> [that] the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.

In Article 4 (1) CEDAW calls for the "adoption of temporary special measures aimed at accelerating de facto equality between men and women," which is the definition of affirmative action.

Article 7 of CEDAW calls on state parties to ensure women's eligibility for election to public bodies on the same terms as men. They are to be given the opportunity to exercise the same right as men, to hold public office at every level of government and participate in the formulation of government policy. They are also to be given the right to freely participate in non-governmental organisations and associations concerned with the public and political life of the country.

As a signatory to CEDAW, the Republic of Ghana is required to present its gender records to the expert committee every four years as part of the peer review process of the Convention. In October 2014, the country was engaged in a review to consider issues related to Ghana's sixth and seventh reports at the 59th session of CEDAW.[4]

In addition to CEDAW, the Republic of Ghana has ratified the 1995 Beijing Declaration and Platform for Action.[5] This was unanimously approved by representatives of the 189 countries in attendance at the Fourth United Nations World Conference.[6] The Beijing Declaration reiterates the provisions of the 1948 Universal Declaration of Human Rights and outlines specific steps to be taken to increase women's capacity to participate in

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[2] Available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf?X-OpenDNS-Session=aa51dc5c0ccc5aad4_20f164fd092bf047330bdbd008c25627e6ed_e87517494f200fc78e38e9836285a6a0f2511f94_

[3] Available at http://www.un.org/womenwatch/daw/cedaw/.

[4] See *Graphic Online*, available at http://graphic.com.gh/news/general-news/32688-ghana-at-59th-united-nations-session-on-cedaw-to-defend-gender-rights.html.

[5] Available at http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf.

[6] See *UN Women* at http://www.un.org/womenwatch/daw/beijing/platform/.

decision-making and leadership, and ensure women's equal access to, and full participation in, power structures.

The Declaration includes instructions for governments, national bodies and the private sector. Others included are political parties, trade unions and employers' organisations. The rest are research and academic institutions, sub-regional and regional bodies and non-governmental and international organisations. It directs them to build a critical mass of women leaders in strategic decision-making positions and promote public debate on the new roles of men and women in society and in the family. It also calls for a review of recruitment criteria, training and mentoring practices and the full participation of women in the electoral process, political activities and other leadership opportunities.

The Millennium Development Goals of the UN General Assembly took stock of the gross inequalities in human development worldwide and set eight goals for development and poverty eradication to be achieved by 2015.[7] The third goal was to promote gender equality and empower women.

The Commonwealth Plan of Action for Gender Equality, 2005-2015 provides that women's full participation in democracy and peace processes is crucial for the achievement of sustainable development.[8] It reflects the Commonwealth's principles and values that view gender equality not only as a goal in its own right but also as a key factor to enhance democracy and peace, and eradicate poverty, hunger, and violence against women, among other objectives. It supports and works towards the attainment of the Millennium Development Goals and the objectives of gender equality expressed in the 1995 Beijing Declaration and Platform for Action[9] and 2000 Beijing+5 Political Declaration and Outcome Document.[10]

As regards the regional response, the African (Banjul) Charter on Human and Peoples Rights (African Charter)[11] that entered into force in 1986, recognises the rights, duties and freedoms of every individual and mandates states to adopt legislative or other measures to give effect to them.

The *African Union Constitutive Act*, July 2000[12] sets out the codified framework under which the African Union is to conduct itself, article 3(h) states that the objective of the African Union is for heads of State and governments to:

[7] Available at http://www.un.org/millenniumgoals/.

[8] Available at http://www.justice.gov.za/docs/other-docs/2005_GenderPoA20052015.pdf.

[9] Above, n. 5.

[10] Available at http://www.unwomen.org/en/digital-library/publications/2015/01/beijing-declaration.

[11] Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

[12] Available at http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/8ConstitutiveActoftheAfricanUnion(2000).aspx.

> promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

By article 49 of The New Partnership for Africa's Development (NEPAD), African leaders in 2001 undertook to promote and protect democracy and human rights and promote the role of women in social and economic development.[13] The supplementary NEPAD Declaration recognised a binding obligation to ensure that women have every opportunity to contribute on terms of full equality to political and socio-economic development in their African countries.[14]

The African Union Solemn Declaration on Gender Equality in Africa (Solemn Declaration)[15] in 2004 reaffirmed the commitment to the principle of gender equality in article 4(1) of the African Union's Constitutive Act.[16]

The African Charter on Democracy, Elections and Governance, 2007[17] contains provisions that underscore the importance of the equal representation of women *"at all levels"*.

The Protocol to the African Charter on the Human and Peoples Rights of Women in Africa, African Charter (Optional Protocol) was ratified by the Republic of Ghana in 2007.[18] Article 9(1) on the Right to Participation in the Political and Decision-Making Process enjoins states to take specific positive action to promote participative governance and their equal participation in political life through affirmative action.

The Legal Context and Framework on Gender Equality in Ghana

The principles of the Universal Declaration of Human Rights are to be found in chapter 5 of Ghana's Fourth Republican Constitution.[19] National provisions on affirmative action and gender equality can be found in article 17(1), which stipulates that each person is equal before the law and in Article 17(2), which prohibits discrimination on the grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status. The most firm mandate for Affirmative Action can be found in Article 17(4) (a), which provides:

> Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to provide -
>
> (a) for the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society.

[13] Available at http://www.dfa.gov.za/au.nepad/nepad.pdf. See also http://www.nepad.org/about.

[14] Available at http://aprm-au.org/admin/pdfFiles/aprm_dpec.pdf.

[15] Available at http://www.justice.gov.za/docs/other-docs/2004_AUdeclaration.pdf.

[16] Available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=173361.

[17] Available at http://www.ipu.org/idd-E/afr_charter.pdf.

[18] Available at http://www.achpr.org/instruments/women-protocol/.

[19] Available at http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php.

The Directive Principles of State Policy in article 34 of the Constitution, which are justiciable,

> … shall guide all citizens, the Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other parties and other bodies and persons in applying and interpreting the Constitution or any other law, and in taking and implementing any policy decisions for the establishment of a just and free society

Articles 35 (5) and 35 (6) (b) provide that:

> (5) The State shall actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, *gender* or religion, creed or other beliefs.
>
> (6) Towards the achievement of the objectives stated in clause (5) of this article, the State shall take appropriate measures to
>
> (a) …
>
> (b) achieve reasonable regional and *gender balance* in recruitment and appointment to public office.

Article 35(6) affirms the fact that *"appropriate measures"* shall be taken to achieve integration and *"reasonable regional and gender balance"*.

Article 36(6) of the Constitution provides that the State shall afford equality of economic opportunity to all citizens and in particular,

> (6) the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of economic development in Ghana.

The findings of the Constitution Review Commission in 2011 were that the Constitution adequately provides for a broad framework within which to achieve gender balance in recruitment and appointment in public office.[20] Despite the presence of a framework found to be satisfactory, the 2011 Constitution Review Commission and the 2012 White Paper on the Constitution Review Commission's Report[21] nonetheless supported the need for an Affirmative Action Bill to provide the necessary detail for effective actions to achieve gender equality. Both provided timelines for the enactment of the Bill after the pending amendment of the Constitution.

Article 75 of the Constitution, outlines the processes for the execution of a treaty. Article 75(2) makes it clear that treaties, agreements or conventions executed by or under the authority of the President must be ratified by Act of Parliament or a resolution of Parliament

[20] See Constitutional Review Commission Presentation, 16 May, 2001.

[21] Available at http://ghanaoilwatch.org/images/Articles/crc_white_paper_report.pdf.

supported by the votes of more than one-half of the members of Parliament after the requisite Cabinet approval.

As a dualist state, the Republic of Ghana is required to ratify a treaty internationally and then proceed to ratify the treaty, in accordance with the Constitution. Two steps are required: the international intervention, followed by the domestic process, in order to transform the treaty from international law to domestic legislation. Given the international obligations of the Republic of Ghana and the injunction in the Constitution, the enactment of an affirmative action law for Ghana is a *sine qua non* for gender equity to be established as a lead to gender equality.

Apart from the legal framework, there are policy documents that support affirmative action. In 1998, the Cabinet issued a Directive on Affirmative Action *"to provide a set of guidelines for systematic and sustained implementation of the various aspects of Affirmative Action towards equality of rights and opportunities for women in Ghana."* The directive called for a clear administrative framework to handle women's affairs and resources to enable the National Council of Women and Development to mainstream women's issues. The directive also established targets to increase the representation of women in Parliament and in local government. It proposed a 40% female membership on every advisory body such as public boards, official bodies, Commissions, councils, committees, Cabinet and the Council of State. Emphasis was placed on the need to support the education and training of girls and women and public education on Affirmative Action.

The women's civil society coalition hosted by Abantu for Development in 2004 put together The Women's Manifesto for Ghana. The Manifesto is a political document and advocacy tool that sets out critical issues of concern to women in Ghana concerning their rights and equality and makes demands to address them. It resulted from insufficient attention to critical issues affecting women, including under-representation in politics, policy and decision-making, and in public life in general. Through the Manifesto, women's organisations wanted to provide an agenda for policy-makers, making clear that *"women know what they want"*. The Manifesto demanded affirmative action to push women's representation in Parliament to 30% by 2008 and 50% by 2012.

There is also the Ghana Shared Growth and Development Agenda, 2010-2013, which provides broad policy guidelines and strategic direction that encompasses among its overarching social and economic goals, goals such as, *"embarking on affirmative action to rectify errors of the past, particularly as they relate to discrimination against women"*.[22]

[22] Available at http://eeas.europa.eu/delegations/ghana/documents/eu_ghana/ghana_shared_growth_and_development_agenda_en.pdf.

There is currently an on-going review of the National Gender and Children Policy.[23] Unfortunately, in the absence of a substantive law that mandates enforcement, the goals in the legal framework and the policy documents have yet to be fully achieved.

The Constitution Review Commission observed that though women make up slightly more than 50% of the national population, they constitute only 8% of political and public office appointments. It needs to be said, however, that there has recently been an unprecedented number of women appointed to key top public offices. At the highest level of government, women make up 29% of Ministers, 23% of Deputy Ministers, 16% of Chief Directors or Principal Secretaries and 8% of Metropolitan, Municipal, and District, Chief Executives. The National and Regional Houses of Chiefs have begun a process to fully integrate queen mothers into both houses to break the male domination on the central authority of traditional rulers. While statistics show that the number of households supported primarily by female breadwinners has increased steadily, women's participation in public life has not flourished in the same vein. The number of women in Parliament for instance, has fluctuated greatly, falling from 18.2% in 1965 to 3.5% in 1979 and rising from 8% in 1992 to 10.5% in 2012. The number of women elected to District Assemblies, the governance institutions of local government, has also tended to remain below 10% across the regions, despite the fact that women are 52% of the country's population.

Though women are engaged to play important roles in the campaign and mobilisation of support for political parties, they rarely occupy high-level decision-making positions in these bodies, despite their higher representation in political offices or public administration. At present therefore, women's decision-making is still primarily restricted to social aspects of the family while men serve as the gatekeepers of power. While it is common for political parties to consider ethnic, regional, and religious, background, when selecting nominees, gender rarely serves as a criterion for this selection. Public life is based, not purely on a system of advancement by merit, but on patriarchal notions of gender and gender roles grounded in the socio-cultural context rather than the absence of stereotyped perceptions of gender capabilities.

In recognition of the urgent need to halt and reverse the effects of the marginalisation of and discrimination against women and promote the sustainable development of the country, the Ministry of Women and Children (now the Ministry of Gender, Children and Social Protection), established in 2001, absorbed the bureaucratic institutions on gender issues and began work to provide a comprehensive and effective affirmative action gender equality law.

[23] Available at http://www.hsph.harvard.edu/population/womenrights/ghana.gender.04.pdf.

The draft Affirmative Action (Gender Equality) Bill

A committee was established to facilitate the review of the 1998 Affirmative Action guidelines and solicit inputs for the drafting of the Bill. Members of the committee facilitated consultations and stakeholder fora in the ten regions of the country and legislation from other jurisdictions was considered.

The committee also engaged in public education on the importance of women's increased participation and representation in governance and decision-making in every sector of the economy where gender disparities are most visible, persistent, and have proved difficult to tackle. Research was also conducted to provide the necessary basis to draft the legislation. The first draft of the Affirmative Action (Gender Equality) Bill[24] was prepared in 2013. Since then, there have been consultative meetings with civil society and the Parliamentary Committee on Gender and Children. Various recommendations are currently being considered by the Minister for Gender, Children and Social Protection prior to the submission of the Bill to Cabinet for approval in order for it to be laid in Parliament.

The purpose of the Bill is to effectively redress social, cultural, economic and educational gender imbalances in Ghana, based on historical discrimination against women that impedes sustainable national development. The Bill also seeks to promote the full and active participation of women in public life by providing for a more equitable system of representation in electoral politics and governance that is in accordance with the Republic of Ghana's international obligations. The relevant Conventions are listed in a Schedule to the Bill.

The Bill is designed to achieve gender equality, defined to mean a situation where women and men are given equal social value, equal rights and equal responsibilities, and have equal access to the means to exercise them. The statutory framework to achieve this includes strategies that have been placed in the Schedules to the Bill.

The stated object of the law is to ensure the progressive achievement of gender equality in political, social, economic and educational matters. This is to be subject to re-evaluation periodically to ensure effective advances are being made. Appropriate measures are to be taken in the public and private sector for the full integration of women into the mainstream of economic development and the Minister for Gender, Children and Social Protection is to provide the policy direction on affirmative action as it relates to gender equality.

A multi-sectoral Affirmative Action Management Board is to be established as the central authority for the collection of information on gender equality that will co-ordinate issues concerned with the promotion of affirmative action. It will make recommendations on a national plan of action and advise the Minister on policy matters on gender equality.

[24] See http://www.ghanaiantimes.com.gh/draft-bill-for-equitable-system-of-representation-ready-soon/. and http://www.modernghana.com/news/477281/1/affirmative-action-bill-for-parliament-by-septembe.html.

The roles of the Independent Constitutional Bodies to promote gender equality have been defined in the Bill. These bodies are the Commission on Human Rights and Administrative Justice, the National Commission on Civic Education, the National Media Commission and the Electoral Commission.

The Commission on Human Rights and Administrative Justice is to promote affirmative action, play an advocacy role, and investigate complaints about gender inequality. The National Commission for Civic Education is to create and sustain the awareness of the public on gender issues, educate and encourage the public against gender discrimination, and enlist the services of traditional authorities and non-governmental associations to spread the word on gender equity and gender equality.

The National Media Commission is to take appropriate measures to ensure that women are portrayed in a positive light, avoid the stereotyping of women and guide public opinion against attitudes that discriminate against women. The Electoral Commission is to co-ordinate compliance with the Act by political parties and ensure the increase in the representation of women in Parliament by political parties.

Affirmative action and gender equality in governance institutions is dealt with in the Bill and it is required that the government ensure the appropriate representation of 40% of women in governance and decision-making positions. This is to apply to the public service generally and to ministerial positions, the Council of State, the Independent Constitutional Bodies and the governing bodies of state institutions. Each public sector institution is to have a gender equality policy. Monitoring is to be done by the inclusion of gender equality information in the annual report of an institution, a copy of which is to be submitted to the Secretariat of the Affirmative Action Management Board. The need for transparency in recruitment in the public service is stipulated and is to be in keeping with the spirit of the right to information as far as disclosure of information is concerned.

As regards recruitment in the Civil Service, the Bill provides that the principles of the Act are to be taken into consideration in the filling of vacancies for positions of authority and decision-making. The Civil Service is to take measures to address and prevent discrimination in the workplace and ensure that women are not denied their promotions because of it.

The 40% quota for the recruitment of women also applies to the security services, defined to include the Ghana Armed Forces, the Police, Prison, Fire, Customs Division of the Ghana Revenue Authority, the Immigration Service and the Bureau of National Investigation.

The Bill provides for gender equity in the Judiciary, in education, and in local government. The five strategies for gender equity in the Judiciary and Judicial Service are in a Schedule. They provide for a strategic plan that includes the objective of the gender policy, the requirement of balanced representation of men and women at the decision-making level and steps to be taken to ensure equal treatment in staff recruitment and employment procedures.

Others strategies include the strengthening of the Human Resource Directorate, Monitoring and Evaluation Directorate, and the Judicial Reform Directorate, to undertake research on gender issues and the adoption of gender mainstreaming in the Judicial Service.

Records from the Judicial Service in March, 2015, reveal that 4 out of the 12 members of the Supreme Court are women, 28 judges of the Appeal Court are women while 27 out of the 98 High Court judges are women. In the lower courts, 21 out of the 58 judges are women and 16 out of the 50 District Court judges are women. These statistics are encouraging and represent a growth in the representation of women on the bench. Added to this, Ghana is proud to have the first female Chief Justice.

Three Schedules detail the strategies to achieve gender equity at the basic, secondary and tertiary levels of education. At the basic level, the strategies include improved resources for education for girls and the formation of girls' clubs in schools. At the secondary level, the strategies include supporting brilliant but needy female students with scholarships and special policies for science and mathematics. At the tertiary level, there is to be a lower cut-off point for female applicants and places reserved for females from deprived districts and private institutions are to ensure an increase in female enrolment.

The strategies for gender equity in education generally are in a separate Schedule. These provide for non-formal education departments for adult females, curriculum review to include courses on gender equality and programmes on governance issues. Others are the provision of school meals to encourage female pupils and students to stay in school and the avoidance of gender stereotyping.

Another key strategy is continuous sensitisation of the general population, especially children, on gender roles and female rights, and education on harmful cultural and traditional practices. The placement of strategies in the Schedules enables them to be an easy reference point and changed by legislative instrument.

As regards local government, the President is to ensure gender balance in the nomination of persons vetted by the Public Services Commission as District Chief Executives of District Assemblies and for the appointees of District Assemblies.

Political parties are to adopt measures to overcome obstacles to the full participation and representation of women in party politics. This is to apply in the party machinery as well as in the contest for elections. The Electoral Commission is to use its resources to reach a consensus on affirmative action. As political parties are voluntary associations, affirmative action is a challenge. The Bill responds to this challenge by providing for the withdrawal of support in kind provided by the Electoral Commission to political parties. This support includes the provision of vehicles purchased with public funds. In additions, State protocol courtesies, for example at gateways to the country, are to be withheld from a party that does not meet the affirmative action requirements. The Electoral Commission is to "name and shame" political parties that fail to comply with the Act by exposure in the media. This is

similar to what happens currently when a political candidate has failed to meet the requirements for registration. In contrast to other jurisdictions, there is no public funding of political parties in Ghana. Article 55 (11) of the Constitution is the only article that deals with the public support of political parties. It provides that the State is to provide access to the media and support from the Electoral Commission, and ends there.

The strategies for gender equity in political parties are in the Eighth Schedule. They include the training of successful political candidates, mentoring programmes, separate budget allocations for women in local government, and funding for women's empowerment. Compliance is voluntary because, as stated in the Government White paper on the Constitution Review Recommendations, political parties are voluntary associations, guided by their own ideologies and constitutions that provide their attraction to popular electoral vote. They cannot therefore be compelled to comply with affirmative action standards to include women in their political agendas, although a strategy that could be adopted would be to field female candidates in safe seats.

There are also provisions on gender equity in traditional authorities and trade unions in the Bill. The National, Regional Houses of Chiefs and Traditional Councils are to employ strategies for the admission of queen mothers and female traditional rulers, into the houses of chiefs, to ensure gender equity. Whenever the selection of a chief is required for government business, male and female traditional rulers are to be selected equally.

Trade unions are to ensure that gender equity is reflected in their constitutions and women should comprise not less than 40% of the membership of their executive boards at any point in time. The Chief Labour Officer will not register a trade union that fails to comply as required in the *Labour Act, 2003*,[25] or if registered, the registration will be cancelled.

Gender equity in private employment has not been left out. The Bill stipulates that a designated employer, one who employs more than 150 people, is to maintain a quota of 40% women in its work force and to have a gender equity plan for the maintenance of the quota. The plan is to be reviewed every two years. The designated employer is to submit an annual report on gender equity to the Chief Labour Officer. Where a Labour Inspector has reasonable grounds to suspect a failure to comply, the employer is to be given time to comply or be prosecuted.

Tax incentives are to be given to employers who comply within the first 12 months after the commencement of the Act and a designated employer who does not have a certificate issued by the Chief Labour Officer that indicates compliance is not to be given a government contract.

Included in the clauses on miscellaneous matters, the Bill provides a grievance procedure. A complaint maybe submitted to the Commission on Human Rights and Administrative

[25]Act 651, available at http://www.nlcghana.org/nlc/privatecontent/document/LABOURACT2003.pdf.

Justice, the Affirmative Action Management Board or to the National Labour Commission. The Labour Commission is to carry out the investigation in the first instance in a labour matter. The Commission on Human Rights and Administrative Justice can also undertake investigations and make its recommendation. Further dissatisfaction may be addressed by court action in accordance with the due process of law provision in article 125 of the Constitution.

Collaboration with public agencies is important and the Bill provides for this. A public officer who does not co-operate with the Ministry of Gender, Children and Social Protection to provide information is liable to prosecution. The sector Minister may require data from any institution or body under the Act. A person who victimizes, obstructs, exerts undue influence, or subjects a female politician to verbal attack, amongst other things, commits an offence. A designated employer who fails to comply with the Act also commits an offence. Section 25 of the *Interpretation Act, 2009* provides that on the conviction of a body corporate, the director, the general manager, or any other senior officer of the body corporate, is deemed to have committed the offence.[26] Accordingly, the senior management of a designated employer will be sanctioned for contravention of the Act.

Under the regulatory power, the Minister responsible for gender may make regulations on specific measures for gender equity and equality, their programmes, data collection, the gender equity plan, and Codes of practice, amongst others.

Conclusions and recommendations

The import of the draft Affirmative Action (Gender Equality) Bill clearly meets the requirements for gender equity in a way that will lead to gender equality in accordance with the international obligations and the Constitution of the Republic of Ghana, but what will pose the greatest challenge and area of difficulty is the implementation of this laudable piece of legislation for the advancement of women.

How will the major stakeholders, the Ministry of Finance, the Ministry of Chieftaincy, the Labour Commission, and the Electoral Commission, monitor and evaluate gender equality? What about the Commission on Human Rights and Administrative Justice, the National Security Council, the Judicial Service and organised labour? What methodologies for compliance by the Labour Commission are envisaged? Will the Ministry of Chieftaincy and Traditional Affairs craft the necessary strategies to achieve gender equality for traditional rulers? What are the views of organised labour about the implementation of the law? Will the National Security Council be able to enforce compliance by the security services that traditionally are adverse to the disclosure of information?

Are there any areas that the Bill has failed to include, such as gender equality in sports? The prowess of Ghana's male footballers, the Black Stars, is internationally acclaimed, but do

[26] Act 792.

female athletes have the same opportunities in relation to training? Despite the limited opportunity for women in sports, there is the example of the 17-year old girl who has become Ghana's first Olympic gold medallist almost purely thanks to her own talent and hard work. This demonstrates that given the opportunity female athletes can be as successful as their male counterparts.

Finally, will the Minister for Gender, Children and Social Protection have the co-operation of other Ministers for the amendment of their laws to include gender equality? These vexed questions are likely to hinder the progress of the Bill[27] unless an aggressive consultation programme is commenced with a roadmap to close the collaboration gaps in the shortest possible time.

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Challenges of trying to change attitudes on gender issues through legislation; the South African legislative experience

Tsitsi Chitsiku[1]

Abstract

This article looks at the South African legislation that provides for gender equality and assessesd the legislative environment in which the Women Empowerment and Gender Equality Bill (WEGE Bill) is proposed. There are attitudes and systemic behaviors which seem to have continued despite the quantity of legislation that has been passed. An attempt will be made to answer the question: Is it the quantity of legislation that matters or does it take more than just legislation to ensure that all forms of discrimination against women are eliminated and thus empower women?

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Introduction

One day I was driving out of the allocated parking at work and there was a tap on the window. The car parked behind me was a Toyota Hilux and the owner of that car was at the window (Mr X). I was driving the latest Ford Ranger 3.2 litre. A conversation ensued in which Mr X asked about the performance of the Ford Ranger etc. He then said I have always admired the Ford and it is a wonder that it is even being driven by a woman and it is a 3.2 litre engine! Power and women do not jibe?

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Legal Instruments Prohibiting Gender Discrimination

In South Africa gender discrimination is regulated by many instruments with the United Nations Convention on the Elimination of all Forms of Discrimination Against Women setting the tone.[2] South Africa has legislated extensively on the elimination of all forms of discrimination against women starting with the *Constitution*.[3] The country has a history of great diversity and inequalities based on race and gender among others. When the *Constitution* was crafted, addressing those disparities was primary and a great driving force behind most of the provisions. The founding provisions in Chapter 1 provide for the following values, among others:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

Chapter 2 of the *Constitution* is the *Bill of Rights*.[4] Section 9 provides for "Equality" as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, **gender, sex, pregnancy, marital status**, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

It is necessary to quote the equality provision in full because it is the foundation of all the other laws that have been enacted or proposed to eliminate discrimination. This paper focuses on discrimination on the basis of gender, with sex, pregnancy and marital status as incidental, and the laws deriving from the constitutional imperative to enact legislation. Of

[2] Available at http://www.un.org/womenwatch/daw/cedaw/.

[3] http://www.gov.za/documents/constitution-republic-south-africa-1996.

[4] http://www.gov.za/documents/constitution/chapter-2-bill-rights.

note is that the prohibition against discrimination is targeted at both the state and other natural and juristic persons.[5]

The *Constitution* further provides for two Constitutional Commissions, which are largely responsible for ensuring that human rights are observed. These are the Human Rights Commission[6] and the Commission for Gender Equality.[7] The details of the establishment and functions of these Commissions are in specific legislation for these Commissions.[8]

One of the first anti-discrimination laws enacted is the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (*Equality Act*).[9] It is a general Act which attempts to address all kinds of inequalities, but this paper will extract the provisions touching on gender. Some of the values encapsulated in the Preamble are as follows:

> The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those of a systemic nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;
>
> …
>
> This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom,

These values reflect South African history and sound very compelling. Emotional language, like *caring* and *compassionate,* is used because nobody wanted to go back to a system which was lacking in compassion. Women were not allowed to stay with their husbands who were working in the cities and they needed a pass to visit. Family life was disrupted.

Section 8 of the *Equality Act* specifically prohibits discrimination on the ground of gender. No person may unfairly discriminate against any person on the ground of gender including-

(a) gender-based violence;

(b) female genital mutilation;

(c) the system of preventing women from inheriting family property;

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[5] Constitution of the Republic of South Africa, s. 8(2), above n. 3.

[6] See http://www.sahrc.org.za/home/.

[7] See http://cge.org.za/.

[8] See *Human Rights Commission Act*, 2013, no. 40 and *Commission on Gender Equality Act, 1996*, No. 39.

[9] 2000 Act No. 4, available at http://www.pprotect.org/legislation/docs/PROMOTION%20OF%20EQUALITY%20AND%20PREVENTION%20OF%20UNFAIR%20DISCRIMINATION%20ACT%204%20OF%202000.pdf .

(d) any practice including traditional, customary, or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;

(e) any policy or conduct that unfairly limits access of women to land rights, finance and other resources;

(f) discrimination on the grounds of pregnancy;

(g) limiting women's access to social services or benefits, such as health, education and social security;

(h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;

(i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.

This list of prohibitions pretty much covers the issues on which most women face discrimination.

The Commission on Gender Equality referred to earlier is provided for in the *Commission for Gender Equality Act 1996*.[10] The preamble to the Act states some of the functions of the Commission as including *"the power to … monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."* The Commission is primarily responsible for ensuring that women's rights are treated as human rights.

One case dealt with by the Gender Commission involved a community which prohibited women from wearing pants. A woman was stripped and her house burnt down because she had worn pants in defiance of community rules made by the traditional leadership. Another case involves succession to traditional leadership by women. Under African customary law, it was unheard of that a woman would be in line for succession as a traditional leader unless the tribe is matriarchal.

WEGE Bill

Despite having the Human Rights Commission and the Gender Commission which is dedicated to gender matters, a government department (ministry) was established in 2009 named Department of Women, Children and People with Disability. The name of the department is a clear indication that women are considered as a vulnerable group in the same class as children and people with disabilities (interesting). The new department felt that not enough had been done regarding the empowerment of women and embarked on

[10] Above n. 8.

piloting the Women Empowerment and Gender Equality (WEGE) Bill.[11] The WEGE Bill is also intended to give effect to section 9 of the *Constitution* in so far as the empowerment of women and gender equality is concerned. Furthermore, the Bill aims to align all aspects of laws and implementation of laws, related to women empowerment and the appointment of women in decision-making positions and structures.

The WEGE Bill went through a lot of drafts primarily because it is coming into an environment which is already regulated by other laws. The existing legislation generally deals with prevention of discrimination and affirmative action, and some of these laws are targeted at previously disadvantaged groups which include black people and women. The WEGE Bill is only concerned with women and girls. To deal with the existing legislation, the WEGE Bill recognises the other laws and defined them as "applicable legislation" and listed in the Schedule 43 existing Acts that have gender-related provisions. Despite the fact that there were already 43 laws containing provisions on gender in one way or another, it was still felt that another law was required.

The dilemma with the crafting of the WEGE Bill was finding relevance in an already extensively regulated area. In the Memorandum of Objects, it is stated that the Bill is intended to promote equality perspectives in relation to women and to identify and prevent discrimination against women on the basis of gender and race. An admission is made in the statement on the objects of the Bill in the Memorandum on the Bill. Paragraph 3.1 says:

> It is submitted that the proposed legislation does not aim to create new anti-gender discrimination legislation; however its aim is to introduce measures and targets to strengthen existing legislation on the promotion of women empowerment and gender equality. The proposed legislation carries forward the constitutional vision of equality by requiring the development of plans and measures to redress gender imbalances and to submit those plans and measures to the Minister for consideration, evaluation and guidance.

There is a definite effort to find relevance for the WEGE Bill amongst other detailed laws that provide for gender equality and how to supplement the already existing legislation, particularly when the WEGE Bill was only concerned with a particular section of society.

The applicable legislation covers all persons who were disadvantaged by unfair discrimination. The applicable legislation has its own enforcement mechanisms for breach. There is a possibility that a person may comply with the applicable legislation on the whole but may be found short in respect of gender issues. In addition to the *Equality Act* as applicable legislation, we have the *Employment Equity Act 1998* to provide for employment equity.[12] It has extensive provisions for affirmative action and this is at a general level of

[11] Available at http://www.gov.za/sites/www.gov.za/files/Bill50B_2013__0.pdf.

[12] Available at http://www.labour.gov.za/DOL/legislation/acts/employment-equity/employment-equity-act.

persons previously disadvantaged by unfair discrimination: *designated groups*, which are defined as black people, women, and people with disabilities.

However, when will it be said that a person has failed to comply on the general level (black people) or on the specific level (women and girl children)? The question is: do we need more laws, or better enforcement? Furthermore, are the issues that we are dealing with capable of resolution through legislation?

Some of the interesting provisions in the WEGE Bill will now be considered.

One of the objects of the Bill in clause 3 is to provide for the implementation of measures to achieve a progressive realisation of a minimum of 50% representation and meaningful participation of women in decision-making positions and structures. Is this realistic? A debate has been going on in the country in respect of the judiciary. The Supreme Court of Appeal (SCA) has vacancies and of the seven candidates that have been shortlisted, only one is a woman. Of the 23 judges of the SCA, only 6 are women. This prompted the spokesperson of the Judicial Service Commission (JSC)[13] to say:

> Government must actively monitor progress of women who enter the profession and the kind of work that they got to do as this impacted hugely on their ability later in life.[14]

This is just one institution, and although the qualifications required are very high, more than 20 years after democracy, the statistics leave much to be desired. They make the aspiration of 50% representation pie in the sky. There is one very important plea by the JSC that the intervention must begin at the entry point.

The Minister is empowered under clause 2 of the WEGE Bill to designate public bodies and private bodies which must comply with one or more provisions of the Bill. Designated bodies are expected to develop and implement plans and strategies for the promotion of the empowerment of women and gender equality and submit these to the Minister for consideration, evaluation, and guidance. The plans must indicate how the 50% representation will be achieved progressively. Each designated body must establish a Gender Focal Point (GFP) within three years of commencement of the Act.

The GFP is responsible for gender mainstreaming, which is another highlight of the WEGE Bill. This is the process of identifying gender gaps and making women's, men's, girls' and boys' concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programmes in all sectors of life to ensure that they benefit equally. Gender mainstreaming is one aspect that is new in respect of laws that provide for gender equality. Designated bodies must develop and implement plans and measures which seek to ensure gender mainstreaming. The interesting thing is that the plans must, among

[13] http://www.judiciary.org.za/about-the-jsc.html.

[14] Legalbrief Today, 13 March 2015.

other things, show steps aimed at ensuring compliance with obligations contained in applicable legislation and international agreements.

The WEGE Bill imposes another layer of administration or regulation. Plans, measures, programmes, strategies and policies must also be developed in respect of measures to empower women within designated bodies, access to health care (including reproductive health), economic empowerment of women, socio-economic empowerment of women in rural areas, and socio-economic empowerment of women with disabilities. The sad aspect is that when all these documents are submitted to the Minister, it is for consideration, review, and guidance, or for consideration and evaluation. The real enforcement of the programmes is lacking.

The applicable legislation has similar requirements, for example, the *Employment Equity Act.*[15] It applies, though to a wider spectrum of society and has a strong enforcement regime. Clause 17 of the WEGE Bill provides for enforcement, but it does not create any offences. The Minister may use any dispute resolution mechanisms to address non-compliance with this Act or applicable legislation.

Chapter 2 of the WEGE Bill, particularly clauses 4 and 6, are in my view the crux of the matter. They provide for education and training generally and public education on prohibited practices, including gender-based violence. One Sunday afternoon I was sitting with a family who had a four year old son who fell and came crying to the father. The father (who is affluent) picked up the son and said to him; "son you are a man, you need to be strong, don't cry, men don't cry". On engagement, the father of the child said, "if a snake were to appear, who will kill it, but the man". There is also the habit of some to call a group of both females and males "guys". This is what is referred to in paragraph 4(1)(a) and (e) as pervasive discriminatory patriarchal attitudes and prejudices and current practices that hinder the achievement and enjoyment of gender equality and social cohesion. I wonder what the reaction would be if someone calls a group of men and women "gals or ladies"?

Paragraph 4(1)(c) encapsulates what we need most, namely to capacitate and enable women to assimilate and develop knowledge, requisite skills and values in order to achieve the progressive realisation of at least a minimum of 50% equal representation and meaningful participation of women in all decision-making positions and structures and economic empowerment. Clause 6 requires education of the public on practices that unfairly discriminate on grounds of gender, including gender-based violence.

One area which is very cloudy, is the line between tradition/culture or customs, and discrimination. Many women put up with gender violence or abuse from their partners because culturally it is wrong to leave or even report that behaviour to the authorities and in most cases the man is the only bread winner. In South Africa there is a tradition known as "ukutwala" (to carry) which allows a man to carry a woman he likes to his village and she

[15] Above n. 12.

becomes his wife. Traditionally it was done where there was an existing relationship between the parties and the man wanted to fast track the marriage. However this has been exploited and abused to the extent that young girls have been abducted and raped in the name of tradition and culture. Be that as it may, traditionalists are crying foul that the people's culture is being eroded.

Conclusion

Legislation on its own will not address gender discrimination that is steeped in attitudes. As long as we have decision-makers who have embedded patriarchal attitudes, like Mr X who marvels at a woman driving a powerful car, or the father of the four year old who fears that a snake will appear in the boardroom and needs men to kill it, legislation alone will not solve the problem of gender discrimination.

The WEGE Bill went all the way to Parliament, but lapsed after elections in 2014 and has not yet been revived. The Department has been relieved of the children and people with disabilities responsibilities. The responsible Minister is now the Minister in the Presidency responsible for Women.