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THE LOOPHOLE



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Issue No. 2 of 2014

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The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at 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.

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

John Mark Keyes, Editor in Chief, *The Loophole*,

E-mail: calc.loophole@gmail.com

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Editor's Notes

Like the preceding issues over the past year, this one presents articles that formed the basis for presentations at the most recent CALC Conference in Cape Town in April 2013. The articles in this issue provide a good idea of the range topics at that conference and come from three different sessions.

This issue begins with Michelle Daley's article presented at the session dealing with the impact of development assistance on legislative drafting. She focuses on the role of the Commonwealth Secretariat and its support to the Caribbean Region in terms of both educational programs and technical assistance. She particularly highlights a project in Belize that aims at strengthening institutional drafting capacity and establishing an environment for sustainable practice.

The next two articles are from the second session on the evolution of drafting technique in both form and substance. Maria Mousmouti looks at the impact of legislation and argues for the importance of paying attention to its potential effectiveness. She examines what effectiveness is in legislative texts and proposes the 'effectiveness test' as a proactive tool that can help improve the coherence of draft legislation and its capacity to achieve results.

In turn, Alison Bertlin's article focuses on the reader's understanding of legislation and how particular drafting techniques affect this understanding. It describes a UK study based on an on-line survey conducted by the National Archives. The results call into question some common drafting assumptions about reader preferences and capacity to understand legislation. It promoted lively debate at the conference and is sure to continue to do so.

The final article is based on Paul Salembier's presentation in the session on the government context for legislative drafting. He looks at the relationship between legislative counsel and their instructing officers and suggests practices for making life easier for instructing officials and improving the performance of underperformers in drafting offices, particularly through the judicious use of information technology, tactful treatment of client drafting and attention to client feedback.

This issue concludes with Eamonn Moran's review of a recently published book on legislative drafting: *Modern Legislative Drafting*, by Dr. Muhammad Majibar Rahman of Gibraltar.

With this issue the publication of papers from the 2013 Conference is largely complete. I would encourage submissions for publication in forthcoming issues over the next year, as well as for the upcoming conference in Edinburgh in April 2015. More details about this and many other drafting conferences are contained on the following page.

John Mark Keyes
Ottawa, May, 2014

Upcoming Conferences

International Conference on Legislative Drafting and Law Reform

The 2nd International Conference on Legislative Drafting and Law Reform, which will take place at the World Bank headquarters *in Washington, DC on June 5-6, 2014*. This conference will provide an excellent opportunity to meet legislative drafters from around the world, while learning about the various influences on the legislative drafting process.

Conference speakers will include professional legislative drafters, academics, legislators, judges, agency heads and lobbyists, hailing from both developed and developing countries. The event is an excellent opportunity for a wide range of experts to meet and exchange knowledge and perspectives on a topic of great importance to governance: the drafting and reform of laws.

For more information on the conference and its sponsors, and to register, please visit the conference website: www.ilegis.org.

Canadian Institute for the Administration of Justice (CIAJ)

The next Legislative Drafting Conference of the Canadian Institute for the Administration of Justice (CIAJ) will be held *in Ottawa on 8-9 September 2014*. The conference theme is *Nudging Regulations: Designing and Drafting Regulatory Instruments for the 21st Century*.

The conference will address a variety of current issues relating to the use and making of regulatory instruments. It will begin by featuring as the keynote speaker Alberto Alemanno, Jean Monet Chair in EU Law and Risk Regulation, HEC (*École des Hautes Études Commerciales*). He and other speakers will consider how the concept of “nudging” is changing the regulatory landscape by focusing on prompting behavioural changes rather than dictating conduct through legally binding rules. The conference will also look at many important and developing facets of regulatory instruments, including public engagement in regulatory development, drafting questions, incorporation by reference of standards, public access to legislation and parliamentary review of regulation-making. An update on recent case law relating to regulatory instruments will also be provided as well as an address by Mr. Justice Cromwell of the Supreme Court of Canada on Access to Law.

Further information is available at the CIAJ website: <http://www.ciaj-icaj.ca>.

Clarity – Learning to be Clear

As many of you will already know this year Clarity is partnering with [IC Clear](#) to present its conference *Learning to be clear* from *12 to 14 November in Belgium*. The conference will have a special focus on what’s going on in Europe and offers a great opportunity for Clarity members to learn from others and catch up with colleagues.

The theme of the conference will cover a range of topics including:

- Clear (legal) language and business, what's the benefit?
- Installing a clear communication policy in organizations
- Clarity in the judicial system
- Protecting the consumer, ways and means
- Using electronic tools for clear drafting
- Designing the law
- Clarity and translation
- Clear communication in governments
- Teaching clear legal writing

If you have any questions, contact Ingrid Adriaenden at ingrid@icclear.net or sign up for regular updates by [joining the conference mailing list](#).

2015 CALC Conference

The next CALC Conference will be *in Edinburgh, Scotland 15-17 April 2015*.

Call for Papers

The theme for the 2015 CALC Conference in Edinburgh is *Legislative Counsel: Catalysts of Democracy and Keepers of an Effective Statute Book*. The theme recognises the importance of legislative counsel to providing governments and legislatures with effective legislation and how this is fundamental to democracy.

The Conference Programme Committee invites proposals for papers that will explore this theme in both general and practical terms. Topics of particular interest are:

- the multiple roles of legislative counsel and the ways in which fulfilment of these roles contributes to democratic government,
- what is needed for an effective statute book (including issues of accessibility and plain language),
- development of legislative drafting skills: theory and practice,
- the government context for legislative drafting, including relations with instructing officials,
- gender issues in the legislative context.

If you would like to present a paper at the conference please send a proposal to katy.leroy@parliament.govt.nz, including

- your full name, title, postal and email address,
- a brief CV,
- the title of the proposed paper and a brief summary of the points to be made.

Each presentation should be 15-20 minutes in length, and additional time will be available for questions.

The deadline for receiving proposals is **31 July 2014**, but please respond as early as you can.

Programme Committee

Katy Le Roy

Bilika Simamba

Therese Perera

John Mark Keyes

Peter Quiggin

Role of the Commonwealth Secretariat and the Development of Legislative Drafting in the Commonwealth Caribbean – A Worthwhile Investment?

Michelle A.R. Daley¹



Abstract

The Commonwealth, and in particular, the Caribbean has been plagued by a scarcity of legislative counsel. The Commonwealth Secretariat has sought to provide developmental assistance in this area. The paper outlines the assistance provided to date and discusses the way forward for the continued development of legislative counsel within the region.

Introduction

The Commonwealth is an association of states which has its modern day genesis in the London Declaration of 1949. This Association has grown to a membership of 54 countries which share common ties of history, language and institutions but more importantly are linked by the common values of democracy, freedom, peace, rule of law and opportunity for all. The Commonwealth is headed by Queen Elizabeth II. The Secretary-General is the Chief Executive Officer of the Secretariat and worldwide advocate for the work of the Commonwealth. The Commonwealth Heads of Government Meetings serve to establish the policy and programmes representative of the needs of all members and provides an opportunity to better understand their goals. The Commonwealth operates through 3 intergovernmental organizations:

¹ Chief Parliamentary Counsel, Anguilla.

- the Commonwealth Secretariat, which executes the plans agreed by the Commonwealth Heads of Government through technical assistance, advice and policy development;
- the Commonwealth Foundation, which helps civil society organizations promote democracy, development and cultural understanding;
- the Commonwealth of Learning, which encourages the development and sharing of open learning and distance education.

This paper will focus on the work of the Commonwealth Secretariat (COMSEC).

One of COMSEC's key objectives is to support Commonwealth states in upholding the rule of law. This is done through interaction geared to foster and develop legal, judicial and constitutional reform with the resultant enhancement of a state's legal and regulatory framework. The achievement of this objective requires in many cases, the provision of diverse types of assistance which integrate to create and ensure the viability of these legal and regulatory frameworks. COMSEC has sought to utilize a holistic approach towards achieving this objective. Assistance has been in the form of:

- technical assistance – the placement of experts to fill institutional gaps; and
- educational programs – the development and financing of training programs.

Legislative Drafting is one of the areas that form part of the multifaceted holistic approach to the upholding of the Rule of Law.

COMSEC's participation in the provision of legislative drafting assistance began out of recommendations made by the Commonwealth Law Ministers at their meeting in London in 1973. This meeting planted a seed which began firstly with the commissioning of a study to determine the scope of the problem in relation to developing countries in the Commonwealth and to identify solutions to the problem. The study was discussed at a further meeting in 1974 after which and the implementation of the recommendations began.

Although COMSEC has provided development assistance by way of both educational programs and technical assistance, the latter arguably has evolved into the mentoring and apprenticeship approach due to the heavy emphasis placed on capacity building and transfer of skills.

Educational Programs – “Teaching Approach”

One of the main recommendations was a need to begin to train legislative counsel. This was essential as drafting in most of the developing Commonwealth states was done by expatriate counsel.

During 1974-75, a series of training courses were organized and funded by the Commonwealth Fund for Technical Cooperation (CFTC). The courses were held in Africa,

Asia and the Caribbean and were of 4- 6 month duration and the participants were awarded certificates. This began the systematic delivery of drafting courses to facilitate participation by representatives of all the commonwealth regions over the next decade. Several Caribbean legislative counsel were trained during this period, returning home to work in drafting offices throughout the region.

In 1986, COMSEC partnered with the University of the West Indies, (Cave Hill Campus) to begin a comprehensive legislative drafting programme for the Commonwealth. This programme included 3 courses in legislative drafting:

- *Certificate Course* – a course of 4-6 months, awarding a Certificate of Attendance issued by COMSEC in association with the UWI;
- *Advanced Diploma Course* – a course of 1 academic year, awarding an Advanced Diploma in Legislative Drafting issued by UWI;
- *Master of Laws* – a course of 14-15 months, awarding an LLM in Legislative Drafting issued by UWI.

In 1992, UWI took over the courses but was supported by the guarantee from COMSEC that the CFTC would sponsor a minimum number of participants. The Certificate Course was discontinued in 1993 and a strong Diploma and LLM Course continued training approximately 12-15 participants each year (with approximately 40 percent of each cohort being from the Caribbean region). This arrangement continued for several years.

The allure of the UWI programme began to wane, primarily for the reason that, though it was very successful, small states were challenged by the need to part with staff for the extended periods required for participation in these courses.

Sensitive to the needs of its members COMSEC realized that it needed to revisit how training was to be administered. In 1995, COMSEC entered into partnership with Commonwealth of Learning to initiate a programme for the training of legislative counsel utilizing the new evolving methods of distance learning. The aim was to develop to provide effective training without requiring staff to be away from the office and in essence crippling, in small states, the ability of drafting offices to operate effectively. The bonus of reduced costs also made this an attractive option. Regrettably, the CARICOM states did not benefit from the pilot programme run during 1996-98 and no programme was run thereafter under this project due to an unavailability of funding from COMSEC and insufficient self-funded participants.

In 2002 the Law Ministers again uttered a cry for the creation of short-term drafting training opportunities. Several initiatives were explored, ably supported by COMSEC, and in 2003 a COMSEC sponsored Workshop on Curriculum Development for the training of Legislative Drafters was held in Barbados. The workshop saw the adoption of the Commonwealth curriculum developed by Professor Keith Patchett together with recommendations that any

programme should have a strong focus on practical drafting exercises. This came to fruition in 2007 with the first course being held at the University of Guyana, Department of Law. A total of 13 participants from 7 CARICOM countries attended.

Evolving further, COMSEC has again partnered with the CARICOM Secretariat and Athabasca University to sponsor 4 CARICOM nominees to undergo the Diploma programme offered by Athabasca University. This programme is a distance programme which permits the students to continue to work in their offices while undergoing studies. However, the COMSEC/CARICOM initiative has sought to enhance the delivery by providing additional mentorship and guidance through the partnering of the students with CFTC Experts currently assigned to the CARICOM Secretariat. As the first cohort is about to begin, this programme will be observed closely to see what this hybridized taught/mentorship approach yields.

Technical Assistance – “Apprenticeship / Mentoring Approach”

COMSEC’s developmental assistance in this area is a bit unique. It arises out of a request for assistance and is constructed by and with full participation of the requesting state. Terms of reference for experts are prepared as a team effort and experts are chosen in consultation with requesting states, not imposed on them. This is how the technical assistance programme was designed to work.

COMSEC has provided legislative drafting experts in every commonwealth Caribbean state during the last 3 decades. These placements were initially designed to assist with specific drafting needs – filling gaps in personnel, clearing of backlog of legislative drafting assignments or specialized drafting projects.

More recently the placement of drafting experts at the CARICOM Secretariat has allowed expertise to be more efficiently and effectively deployed as these experts are able to service the entire region preparing draft harmonized model bills as well as providing in-country interventions from time to time.

The terms of reference of projects have also evolved, moving away from simply the provision of drafting assistance and seeking to grapple with issues of sustainability through capacity building, information and skills transfer and the building or development of institutional frameworks with the goal of creating sustainable environments within which legislative counsel can operate.

The Law Ministers in 2008 discussed and considered the perennial problem of the shortage, recruitment and retention of legislative counsel, recognizing that it was not enough to focus on training alone. This problem required a more sustainable approach based on the adoption of different strategies under broad headings, which included institutional strengthening, recruitment and retention of legislative counsel and capacity building”.

My Own Experience

As a CFTC Expert assigned to Belize, my terms of reference seek to address many of the issues echoed by Law Ministers in 2008. Like many other CFTC Experts, I am working on backlog legislation, capacity building, mentoring local counterparts and transferring skills, information and best practices. Institutional strengthening is also being addressed and I have been tasked with establishing a Legislative Drafting Unit within the Attorney General's Ministry, which provides for a structure to afford career mobility; to professionalize the practice of drafting and to give greater importance to the role of legislative counsel so as to make opportunities in drafting more attractive to young counsel. Institutional strengthening is a key element to developing the sustainable practice of legislative drafting in the region.

The Caribbean arguably does not lack drafting capacity as over the last four decades hundreds of Caribbean nationals have been trained and the majority trained through COMSEC programs. The question is whether COMSEC's investment has really made a difference. I am a product of that investment. I pursued the LLM degree programme at UWI benefitting from the investment in the development of that programme and the resources made available to the UWI in the person of Professor VCRAC Crabbe. Upon completion I returned home joining the Office of the Parliamentary Counsel in Jamaica and was placed under the supervision of the then Deputy CPC, Marie Thompson, an alumna of the COMSEC drafting training programmes held in the 70's and 80's. Mentored by her and several other alumni, I have been able to grow and develop as a legislative counsel, and I am continuing to pay forward that investment in the work I am doing in Belize.

I am not a rarity - I can readily identify alumni throughout the commonwealth Caribbean and beyond. We are Chief Parliamentary Counsel, Senior Parliamentary Counsel and consultant drafters.

Conclusion

COMSEC has provided us as a region with the resources – skilled personnel, – but have we as a region provided an environment for this investment to grow and develop? Have we made the investment sustainable?

In most small jurisdictions, the issues of availability of drafting positions and professional mobility continue to make drafting unattractive to the young lawyers and law students, and many are lured into other lucrative practice areas. It is this problem that gives rise to issues of recruitment and retention.

The Belize project is therefore a new type of assistance geared towards assisting in developing and establishing an environment for sustainable practice. In addition to the establishment of the Drafting Unit within the Attorney General's Ministry, operational guidelines, drafting manuals and legislative management tools are also being introduced. The project has taken a holistic approach dealing not only with the structures within the

Ministry, but also targeting the integrated institutions which play a critical role in the work of legislative counsel. Training has been done in relation to instructing officers so that the capacity of the Ministry personnel tasked with instructing legislative counsel are enhanced and capacity built in this area.

This evolution of development assistance which places greater emphasis on institutional strengthening is anticipated to reduce the problematic issues of recruitment and retention in much the same way as the issue of capacity and availability of legislative counsel in the Caribbean region has been mitigated, if not arguably solved.

COMSEC has established itself as a positive catalyst for the development of the practice of legislative drafting in the Caribbean region. It has been instrumental in maintaining a focus on legislative drafting and its importance for good governance and the rule of law.

What is now required is that governments step forward and play their part! They must lend support and create environments in which the investment made in the training of the human resource and the strengthening of the institutional framework, can thrive and grow.

The Government of Belize is doing just this, in less than two years we have moved from a single legislative counsel to a unit 4-strong and growing. There is robust interest from young counsel to pursue legislative drafting as a practice area and long term career because there is now a structure within which a career trajectory can be mapped. Sustainability can only occur in fertile environments. Paying lip service to the importance of legislative counsel, in the absence of institutional frameworks and where conditions of pay and professional recognition remain unaddressed, will only serve to stifle the successes achieved by COMSEC developmental assistance programmes to date.

Effectiveness as an Aid to Legislative Drafting

Maria Mousmouti¹



Abstract

A lively debate about the quality of legislation has been taking place around the world for two decades already and governments are investing significant resources in this direction. This paper maintains that the quality of legislation cannot be significantly improved unless effectiveness becomes a guiding value throughout the process of conceiving, designing and drafting legislation. In this respect, the content of effectiveness in legislative texts is examined and the ‘effectiveness test’ is proposed as a proactive tool that can help improve the coherence of draft legislation and its capacity to achieve results.

1. Effectiveness of legislation: an emerging value

Effectiveness of legislation is not a novel concept. Quite on the contrary, references to it are encountered in different sources. International texts use the adjective ‘effective’ or the adverb ‘effectively’ in their substantive provisions. The most recent human rights instrument, the United Nations Convention on the Rights of People with Disabilities, uses the word ‘effective’ or ‘effectively’ 32 times when referring to substantive rights. To name a few examples, Article 3 refers to the full and *effective* participation and inclusion of people with disabilities in society as a general principle of the Convention; Article 5 par. 2 refers to the prohibition of discrimination on the basis of disability and the guarantee to persons with disabilities equal and *effective* legal protection; Article 10 obliges state parties to take all

¹ Ph.D. Executive Director, Centre for European Constitutional Law (www.cecl.gr) .

necessary measures to ensure the *effective enjoyment* of the right to life by persons with disabilities on an equal basis with others.

Similar references are encountered in European legislation: Regulation 1173/2011² refers to *effective* enforcement of budgetary surveillance in the euro area and Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography³ refers to effective sanctions, *effective* investigative tools and *effective* intervention programmes. In the way that these provisions are expressed, either in the Convention or in other instruments, they appear to point towards the desired results of legislative action rather than the mere existence of legal remedies. In other words, legislative texts demonstrate a tendency to refer to effectiveness as a way of imposing the obligation to achieve results rather than a mere formal transposition of European or international rules.

Moreover, references to effectiveness are also encountered in documents setting quality standards or offering guidance to legislative drafting. In the European Union, the Communication on Better Lawmaking defined a qualitative legislative framework as one that is ‘simpler, more effective and better understood’.⁴ In the same line, the Interinstitutional agreement on better law making stated that the three Institutions involved in the law making process (Council, Commission and Parliament) ‘will ensure that legislation is of good quality, namely that it is clear, simple and effective’.⁵ To name a further example, the Drafting Guidance of the Office of the Parliamentary Counsel (UK) makes clear that ‘...everything in the guidance is subject to the fundamental consideration that drafts must be accurate and *effective*’... and that effectiveness is a drafting principle that should not retreat in conjunction with other values such as clarity.⁶

The multiple references to effectiveness make this concept neither clear nor specific. In the examples cited above, it is used as an abstract and theoretical term that refers to effectiveness as a desired quality of legislation. But is this the limit for effectiveness? Or does it have a concrete content that imposes a way of formulating and drafting legislation that will lead to results?

² Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:306:0001:0007:EN:PDF>.

³ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:0014:EN:PDF>.

⁴ European Commission, ‘[European Governance: Better lawmaking](#)’ (Communication) COM (2002) 275 final.

⁵ European Parliament-Council- Commission, Interinstitutional Agreement on better law-making [2003] Official Journal of the European Union C C321/1, point 25, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003Q1231%2801%29:EN:NOT>.

⁶ Office of the Parliamentary Counsel, Drafting Guidance, 2011 at p. i, accessible at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271713/OPC_Drafting_Guidance_Dec_2013.pdf.

2. What is effectiveness of legislation?

Effectiveness has become an integral part of the values and principles that characterise legislative quality. In fact, effectiveness reflects the relationship between the purpose and the effects of legislation and expresses the extent to which it is capable of guiding the attitudes and behaviors of target populations to those prescribed by the legislator.⁷ In simple terms, effectiveness expresses the extent to which a draft law can do the job it is intended to do and is considered the primary expression of legislative quality.⁸

Effectiveness is at the same time a value and a principle that guides law making⁹ and a criterion for evaluating its results.¹⁰ Therefore, it has two main dimensions: a prospective dimension when the law is formulated and drafted and a real-life dimension when a law is implemented. The former expresses the extent to which legislation is conducive to the desired regulatory effects (*can a law achieve the desired results?*) while the latter expresses the extent to which the attitudes and behaviors of target populations correspond to those prescribed by the legislator (*has a law achieved the desired results?*).

However, effectiveness is not an abstract concept. On the contrary, it is a feature of every legislative text and is determined by its fundamental elements. Every piece of legislation is drafted to be effective and the following features influence it:

- the purpose,
- the substantive content and legislative expression,
- the overarching structure of legislation, and
- the real-life results.

These features determine, to a significant extent, the capacity of legislation to achieve results. Each of them has a distinct importance for effectiveness:

- purpose sets the benchmark for *what* legislation aims to achieve;
- the substantive content and legislative expression determine *how* the law will achieve the desired results and how this is communicated to its subjects;

⁷ Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constantin Stefanou and Helen Xanthaki (eds) *Drafting Legislation. A Modern Approach* (Ashgate: 2008) at 17.

⁸ Helen Xanthaki, 'Quality of Legislation: an achievable universal concept or an utopia pursuit?' in Luzius Mader, Mart Tavres de Almeida (eds), *Quality of Legislation. Principles and Instruments* (Nomos 2011) 80-81

⁹ Xanthaki, above n. 7 at 17; Wim Voermans, "Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?" (2009), 2:1 *Erasmus Law Review* 66 also available at http://www.erasmuslawreview.nl/files/ELR_issue6_004.pdf; Alexander Flückiger, "Effectiveness: a new Constitutional principle" (2009) 50 *Legislação: cadernos de ciência de legislação* 187.

¹⁰ Luzius Mader, "Evaluating the Effects: A Contribution to the Quality of Legislation" (2001), 22 *Statute Law Review* 119 at 126.

- the overarching structure determines how the new provisions interact with the legal system;
- the real-life results of legislation indicate *what has been achieved*.

Although the influence of external factors on the broader effects of legislation cannot be undermined, every legislative text is the foundation of its effectiveness. Thus, the effectiveness of a legislative text is greatly determined by the way in which legislation is integrated in the legal system, the way its purpose is expressed, the content of legislation, legislative expression and evaluation requirements that can inform the real-life results of legislation.

2.1. The purpose of legislation as a benchmark for effectiveness

All legislation has a purpose. The lack of a reasonable purpose justifying its existence makes a law arbitrary and contradicts the fundamental premise of the rule of law that the legislator acts in the common good.¹¹ Purpose plays a central role in several phases of the life-cycle of a rule: when a rule is conceptualised and drafted, purpose is the ‘link’ between the specific problems addressed, the broader policies of the government and the means chosen to address them; when a law is interpreted, purpose helps diagnose the intention of the legislator. Further, purpose is the obvious starting point in the effort to determine what a law has achieved.

The purpose of a piece of legislation are initially laid down in drafting instructions that illuminate the nature of the problem through background information, what the proposed legislation is supposed to achieve and the means of achieving it.¹² Understanding the purpose of the legislative intervention is a critical task for legislative counsel as a “policy translator” charged with the task of transforming substance into form.¹³ Despite its important role when designing and drafting legislation, purpose is not always so explicit or easy to trace when an Act takes its definite form. The purpose of a law can be expressed through preambles, general or specific purpose provisions or long titles. Alternatively, it can be explained or stated in explanatory material or extraneous documents such as policy papers, explanatory notes or impact assessments. Clear purpose provisions are useful for readers, including judges, and facilitate the application and interpretation of the law. Critics focus on the fact that purpose statements do not introduce rules in the strict sense but are provisions with a looser normative content that have no place in the legislative text.

Although practices differ significantly among jurisdictions, purpose is in some form stated either in the text of the law, in preparatory material or in both. However, purpose is not very

¹¹ Richard Ekins, “The Intention of Parliament” [2010] *Public Law* 715.

¹² Garth C Thornton, *Legislative Drafting*, 4th ed. (Butterworths: London, 1996) at 130.

¹³ Ann Seidman, Robert Seidman and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change. A Manual for Drafters* (Kluwer: 2001) at 26.

often found within the legislative text in the form of explicit purpose provisions, although it can be traced in or deduced from long or short titles of an Act. Information on the purpose of legislation is more abundant outside the legislative text. Extraneous material allows more room for analysis of the broader context of the intervention, the issues addressed and the intended changes. However, quite often purpose is not clearly stated either inside or outside the text and significant deductive effort is required to identify it. This makes the overall objectives of the legislative text rather vague.

Independently of whether purposes are stated inside or outside the text, the ways of expressing purpose can differ substantially in the information conveyed. Purpose statements can convey pragmatic information, broad, policy-oriented information, information on legal objectives or combinations of the above. Pragmatic purpose statements are informative and summarize or highlight certain functions of the text, but provide limited substantive information on what the law aims to achieve. Examples of pragmatic statements are “the purpose of the Act is to make provision for...” or “to amend the law...” or “to transpose in the national legal order Directive X...”. These statements provide no meaningful information with regard to the substantive purpose and objectives of the specific law and therefore their use when attempting to interpret or assess its effectiveness is relatively limited.

Broad purpose statements tend to be the opposite of pragmatic statements. They often state policy rather than legal objectives and tend to be declaratory. Although some of these statements can be well formulated, they are often prone to refer to objectives that go beyond the reach of legislation. Examples of broad expressions of purpose include “the present law aims to make the equality of opportunities a reality for everyone”... or “to increase equality of opportunity” or “to eliminate discrimination”. Such statements define purpose so broadly that they leave the specific objectives of the text to be deduced.

Legal purposes on the other hand state the purpose of the legislation in a specific and legally meaningful way. They are accurate and often combine legal objectives and broader policy objectives. For example, “an Act to render unlawful certain kinds of discrimination” states how the text intervenes to contribute to the fight against discrimination. Legal purposes are even more useful when combined with statements of broader (policy) objectives. For example, an Act “to set a framework for combating discrimination ... in order to ensure the application of the principle of equal treatment” indicates the legal means used as well as the overall objectives to which they contribute. Legal statements combined with well-formulated broader statements set a meaningful benchmark both for the interpretation and the effectiveness of the law.

The variety of ways to express purpose affects the application and the interpretation of legislation. Overall, narrow statements facilitate neither the communication nor the application and interpretation of the law. Broad statements on the other hand can prove confusing if they do not determine the specific objectives that a piece of legislation aims to achieve. Legal statements are more balanced and, if well formulated, they can provide

meaningful guidance to the interpreter and the implementer. The above statements rarely come in pure forms but are usually a combination. Seen from the perspective of effectiveness, the different ways of expressing the purpose of legislation are not a formality but determine the results that the law aims to achieve. Effectiveness is positively promoted when information on the purpose of legislation is available, either in the legislative text or in extraneous material, and *clearly and substantively* indicates what the law aspires to achieve. Effectiveness is promoted when purpose statements determine a clear benchmark for legislation.

2.2. The substantive content of legislation as the ‘heart’ of effectiveness

Legislation usually comes as a solution to problems. This solution is expressed through a choice of legislative techniques, enforcement mechanisms and legislative expression that best serve the desired objectives.

A main task in legislating involves the selection of rules based on their potential to

- serve the objectives of the legislative intervention and bring about the desired results,
- determine appropriate enforcement mechanisms, and
- make the rules clear, precise and easily understood.

The choice of rules determines how behaviours will be directed towards the desired goals, what obligations are imposed, how the rules will be enforced and the consequences attached to them. The content of the law determines *how* it will achieve its results and how rights and obligations are communicated to the subjects of legislation. These choices obviously have a significant impact on the capacity of legislation to achieve results. If the selected rules (or combination of rules) are inappropriate to address the problem or do not contribute to the objective of the law, the design of the rules is ineffective; if enforcement mechanisms are inappropriate or implementation is inadequate, enforcement is ineffective; if the subjects of the law do not know how to comply or encounter difficulties in complying or interpreting rules, drafting is ineffective.¹⁴

Legislative reality confirms the importance of these elements and offers several examples of how poor choices in the content of the law affect its overall performance. Deficiencies include

- insufficient analysis and understanding of the problem addressed through legislation, and consequently the choice of inappropriate rules,
- rules that are not fully consistent or leave gaps in protection or are in tension with existing ones,

¹⁴ Julia Black, “Critical Reflections on Regulation” (2002), 27 *Australian Journal of Legal Philosophy* 3.

- solutions that are complex and difficult to implement,
- complex or inarticulate choices in legislative expression.

The substantive content of legislation lies at the heart of effectiveness. Choices of legislative techniques, enforcement mechanisms and legislative expression determine to a great extent whether a law will achieve results or fail, either partially or entirely. The substantive content of legislation is conducive to results when the choice of legislative techniques, enforcement mechanisms and drafting conventions is proportional and responsive to the purpose of legislation and when these choices are consistent, balanced, coherent and expressed in a clear and precise way.

2.3. Results of legislation as the ‘measure’ of effectiveness

When a law is enacted it is no longer a conceptual exercise: the “implementation game”¹⁵ begins and is expected to achieve results. The relation between the law as a vision and the law in reality is not always linear, since in practice they often differ substantially. The need to learn about the results of legislation is a requirement of democratic governance, a way to prevent adverse effects on fundamental rights and to consistently appraise the responsiveness of the law to the regulated problems and phenomena.¹⁶ In other words, information on the results of the law is necessary in order to evaluate its performance and determine the achievement of the desired objectives.

Information on the results of legislation is provided through post-legislative scrutiny and evaluation as well as through specific reporting, review or sunset requirements included in legislative texts. Post-legislative scrutiny and evaluation monitor the application of the legislation, evaluate its results and apply to the entire legal system while specific reporting or evaluation requirements may pertain to individual provisions (for example, an e.g. obligation to report on how a specific provision is implemented). The latter can include obligations for periodic monitoring of progress, obligations to monitor changes in society, to collect data or to disclose data or information. The lack of information on the application and the results of legislation makes it a “shot in the dark”¹⁷ since little is known on how it works in practice.

Information on the results of legislation generated through legislative evaluation is important for effectiveness, firstly because it enables learning about the real-life results and effects of legislation and secondly because it connects the different phases of the life-cycle of legislation and allows the juxtaposition of initial purposes and real-life results. Without

¹⁵ Eugene Bardach, *The implementation game: what happens after a Bill becomes a Law* (MIT Press: 1977).

¹⁶ Alexandre Flückiger, “L’obligation jurisprudentielle d’évaluation législative: une application du principe de précaution aux droits fondamentaux” in Andreas Auer, Alexandre Flückiger et Michel Hottelier, *Les droits de l’homme et la constitution: études en l’honneur du Professeur Giorgio Malinverni* (Schulthess : 2007) at 170.

¹⁷ Heinz Schäffer, “Evaluation and Assessment of Legal Effects Procedures: Towards a More Rational and Responsible Lawmaking Process” (2001), 22 *Statute Law Review* 132.

information on results, effectiveness cannot be appraised and the errors of legislation cannot be identified and addressed. This information is an important requirement for effectiveness.

2.4. Overarching structure as the context of effectiveness

The overarching structure of legislation is the result of several factors: constitutions and legal traditions, but also political need to show action, timing and pressure to legislate. Quite often, the choice of whether to introduce a new Act, to amend an existing one or to consolidate or to bring existing material together in a functional codification is determined by factors other than the impact of these choices on the effectiveness of the new legislation.

The choices related to the overarching structure of legislation are important because they determine how the new provisions are integrated in the legal system and how these will interact with the broader legislative context. For example, in the area of equality legislation, prior to the introduction of the *Equality Act 2010*, several different Acts co-existed in the UK¹⁸. Although this made the protected grounds (gender, disability, etc.) visible, it caused serious problems of inconsistency in the protection offered and the definition of identical or related terms. The unification of all material dealing with equality and non-discrimination in a single Act was conceived as a solution to the multiple problems that emerged in the course of the years.

Other solutions are also possible in the effort to introduce new provisions in the legal order: for example, relying on codified legislation can choose to disperse equality provisions in different sectoral codes or legislation (labour, family, etc.) as a way to integrate them in their immediate context.

These different options are closely connected to the potential of legislation to be effective for three main reasons:

- firstly, because the structure of legislation affects the accessibility of the law;
- secondly, because structural weaknesses can lead to inconsistencies and difficulties in applying the law, and
- thirdly, because they can jeopardise the achievement of its overall objectives¹⁹.

Thus, the overarching structure of legislation directly affects not only the accessibility and coherence of legislation, but ultimately also the ways in which the effectiveness of legislation is understood, approached and measured. Therefore, effectiveness is promoted

¹⁸ Non-discrimination legislation included the *Race Relations Act 1965* (RRA 1965) amended by *Race Relations Act 1968* (RRA 1968), the *Race Relations Act 1976* (RRA 1976) and the *Race Relations Act 2000* (RRA 2000); *Equal Pay Act 1970* (EPA 1970); *Sex Discrimination Act 1975* (SDA 1975); *Disability Discrimination Act 1995* (DDA 1995); *Employment Equality (Religion or Belief) Regulations 2003*; *Employment Equality (Sexual Orientation) Regulations 2003*; *Employment Equality (Age) Regulations 2006*; *Equality Act 2006* (EA 2006).

¹⁹ Seidman, Seidman and Abeysekere, above n. 13 at 208.

when the distinct legislative options with regard to the overarching structure of legislation are given due consideration in the process of formulating and drafting legislation.

3. The effectiveness test as a way to operationalise quality of legislation

This examination of the elements of effectiveness proves that it has concrete content determined by specific choices in the design and the drafting of legislation. In particular, effectiveness is determined by the formulation and drafting of the purpose, the substantive content of the law, legislative expression, the information on the results of the law, the overarching structure of legislation and the alignment and coherence between these elements.

Effective legislation has a clear purpose that reflects the features of the problem addressed through legislation, depends on a consistent choice of legislative techniques and enforcement mechanisms, creates clear, precise and unambiguous rules and obligations and sets a framework for a systematic monitoring and evaluation of results. Less effective legislation is characterised by blurred, unresolved or inconsistent choices where purpose can be unclear or too ambitious or disproportionate to the legislative intervention. Legislative techniques and enforcement mechanisms can be of limited responsiveness to the problem or poorly articulated. Drafting choices can be inconsistent or contradictory. Data on the application and the results of legislation can be fragmented or inexistent. The interconnection between these elements indicates the overall potential of a legislative text to be effective. If the distinct elements of effectiveness are in place, are articulate in their structure and show a clear vision of what a law aims to achieve and how results are to be measured, basic conditions of rational law-making are fulfilled. In the opposite case, where the elements of effectiveness are unclear, poorly articulated or suffer from internal tensions or imbalances, law-making seems to resemble more a process of wishful thinking rather than addressing aspects of a specific social problem through carefully planned legislative measures.

The effectiveness test is a logical exercise that examines these elements and attempts to identify their potential for results. It looks into the unique features of a piece of legislation and examines how the purpose, the structure, the content and the results of the law are aligned and consistent allowing, if all goes well, results to be achieved. Its advantage is that it views legislation as a continuum rather than separate and unrelated phases of policy design, drafting, implementation and evaluation.

The effectiveness test allows identification of the direct relation between the purpose of the legislation, the appropriateness of the means used and the results²⁰ and can be used throughout the life-cycle of legislation. For draft legislation, it can help detect the best way to lead to the desired results. For legislation in force it can examine the causal relationships

²⁰ Maria Mousmouti, "Operationalising Quality of Legislation through the Effectiveness Test" (2012), 6:2 *Legisprudence* 201.

between the law and its effects, the extent to which the legislation is working and what needs to change. In the drafting phase of legislation, the effectiveness test examines the existence of a clear purpose, a consistent content responsive to the purpose of the law and whether adequate information on results will be available. At a later stage, the effectiveness test examines whether the relation between purposes and results has been verified, what went wrong and what can be improved.

In other words, the effectiveness test allows a diagnosis of the weaknesses in the conceptualization and design of legislation and can prevent regulatory failures. It allows identification at an early stage of the ineffectiveness of content and design (whether the rules used are inappropriate to address the problem tackled or are too broad or too narrow in relation to the stated purpose), the ineffectiveness of enforcement (whether the enforcement strategy or mechanism is inappropriate or implementation is inadequate) and drafting ineffectiveness (whether the subjects of the law do not know how to comply with it or encounter difficulties in complying because the rules are not accessible, coherent or clear, or are complicated and imprecise). Through the effectiveness test, weaknesses can be identified and addressed.

The effectiveness test is a neutral tool. It does not promote specific legislative choices over others but looks at the content and the consistency of the features of legislative texts and judges them objectively in relation to the regulatory objectives. It is not a measure of perfection in legislation but instead a feasible way of ensuring that legislative counsel and policy makers can see the whole picture of what they are attempting to achieve through legislation.

4. The effectiveness test as a tool for legislative counsel

Effectiveness is a fundamental quality of legislation and is particularly useful for legislative counsel. Their unique position in the law-making process allows them to see the legislative solution in its entirety and across its life cycle and to acknowledge the need to make legislation as workable and effective as possible. If legislative drafting is a “phronetic” discipline where “theoretical principles guide the drafter to conscious decisions made in a series of subjective empirical and concrete choices,”²¹ legislative counsel need dynamic principles and tools to assist them in this exercise. Effectiveness as a principle guiding lawmaking, and the effectiveness test as a dynamic tool to assist lawmaking, have the potential to unify the elements of legislation in a coherent whole that can help produce effective legislation.

²¹ Xanthaki, above n. 8 at 78

What works best for the reader? A study on drafting and presenting legislation

Alison Bertlin¹



Abstract

The study described in this article was carried out, in the United Kingdom, by the Office of the Parliamentary Counsel and The National Archives during 2012 to try and understand–

- *more about what it is like to be a reader of legislation, and*
- *whether particular drafting techniques or styles can assist readers of legislation.*

The study gave a much greater awareness of the difficulties readers of legislation face which in turn has–

- *prompted further work on the way in which United Kingdom legislation is presented online, and*
- *led to specific changes to drafting guidance, some of them quite subtle.*

Background

The Office of the Parliamentary Counsel (OPC) is established as a central drafting office to draft most United Kingdom primary legislation (Bills that become United Kingdom Acts of Parliament) and some secondary legislation.

Among many other roles, The National Archives has the function of publishing all legislation in the United Kingdom, which covers Acts of Parliament and Acts of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly; it also

¹ Deputy Parliamentary Counsel, Cabinet Office, Office of Parliamentary Counsel, United Kingdom.

publishes secondary legislation. The National Archives publishes legislation both in print and online.²

OPC, like other legislative drafting offices across the United Kingdom, has adopted a generally “plain language” style of drafting.

Thirty years ago, when the plain language movement was in its infancy, there might have been enough of a gulf between what was then seen as “modern” and the style that had gone before for it to be obvious that *any* plain language version was clearer than the same text drafted in the old style. At that stage, the marginal improvement achievable by adopting one plain language style rather than another was perhaps not considered material. Now that drafters in the United Kingdom generally try to draft in accordance with plain language principles, the question whether some plain language drafting styles are clearer than others has assumed more importance.

Guidance for drafters in OPC (called, simply, “Drafting Guidance”³) consists of two parts. One is called “Clarity” and covers techniques for clear drafting. The other deals with specific drafting techniques and matters (such as numbering and the order in which standard provisions should appear) on which consistency between drafters is important.

Drafting Guidance is generally not prescriptive. Points on which it directs a particular approach are generally those where variations in drafting style are unlikely ever to be needed and would be likely to confuse readers. Many of the observations made in the “Clarity” part of Drafting Guidance are based on common sense and accepted tenets of good drafting. So, typically, in OPC it is left to a drafter to decide which of the possible versions is clearer. But is the drafter’s view reliable? It must inevitably be based on the drafter’s own judgement. But a typical drafter is not a typical reader of legislation – the drafter’s experience of legislation cannot be unlearned and sets the drafter apart from most other readers.

This leads on to the question: is it possible to establish objectively whether one plain language technique is more effective than others?

And is there an optimum point beyond which the usefulness of some plain language techniques tails off? For example, does there come a point beyond which breaking a complex proposition down into more, shorter, sentences is counter-productive?

Embedded in those questions are some important elements. First, they cannot be answered theoretically, so an “objective” answer must be an empirical one. Further, in order to know whether a technique is “effective”, one needs to know who is using the legislation and why. And it is important to be clear about what “effective” means here.

² www.legislation.gov.uk.

³ www.gov.uk/government/publications/drafting-bills-for-parliament.

The study described in this article was designed to find answers to these questions and to test various prototype changes to the website on which legislation is published (legislation.gov.uk).

Who reads legislation and why?

While lawyers represent an important group of readers of legislation, typically accessing legislation through a subscription service (whether online or hard copy), there is now a very large audience of non-lawyers who will typically access United Kingdom legislation through www.legislation.gov.uk, which is a free-to-access United Kingdom government site run by The National Archives.⁴ The site has around 2 million separate visitors per month and provides more than 400,000,000 page impressions per year.⁵

The National Archives has amassed a considerable body of research about users of legislation.gov.uk and from it has distilled three categories, for each of which it has constructed a “persona” to represent a typical member. The three categories identified by The National Archives, and their related personas, are—

- a non-lawyer who needs to use legislation for work, for example a police officer, a local council official or a human resources professional; a persona known as “Mark Green” is assigned to this category, which represents about 60% of users of legislation.gov.uk.
 - Mark Green might need to quote legislation as part of his work, for example if prosecuting a breach of environmental health law; typically he would not have access to legislation via subscription services.
- a member of the public seeking to enforce his or her rights or those of a relative or friend, such as rights to welfare benefit claims or appropriate educational provision for children with special needs; this category is assigned the “Heather Cole” persona.
 - Heather Cole might wish to quote legislation to give weight to her case, or to feel more confident of her own ground, or might have had a particular statutory provision invoked against her and want to see for herself what it says.
 - The Heather Cole category also covers the growing number of litigants in person.

⁴ Many other Commonwealth and European countries have similar sites. See for example. <http://laws-lois.justice.gc.ca/eng/> in Canada.

⁵ www.gov.uk/government/publications/central-government-websites-reporting-on-progress-2012-2013 shows 49,317,302 visits in 2012-13; because of repeat visits to the website, this is a different measure from the number of separate users per month. In 2013-14 there were 440,568,153 page impressions.

- a lawyer; this category is assigned the “Jane Booker” persona.
 - Jane Booker represents all kinds of lawyers from senior lawyers in private practice to law librarians; she would typically have access to subscription services and would look at legislation.gov.uk alongside them.

It is not the purpose of this article to consider whether legislation ought to be written for judges and lawyers alone or for the public at large. As The National Archives’ research has shown, there is in fact a very significant readership among non-legally qualified professionals and large numbers of members of the public actually read legislation.

In any case that would matter only if the aim of making legislation as readily understandable as possible for all readers, including non-lawyers, were incompatible with the requirements of judges and lawyers, principally, that legislation provides certainty, and that it is clear and no longer than necessary.

Effectiveness: understanding and preference

The study was designed to compare the effectiveness of different drafting techniques. For this purpose, a drafting technique was regarded as more effective if its use makes for legislation that is better understood.

Whether, and how easily, legislation can be understood is important. Legislation must not only give effect to the policy but also communicate it. If it fails to do that, it is not effective. If people cannot understand what legislation requires them to do, that is quite simply not fair. If they fail to do what is required because they do not understand what that is, the legislation is not having the desired effect. And if they just ignore it because it is too difficult to understand, that starts to undermine the rule of law.

Even if legislation is comprehensible, if it takes longer to understand it than it should, that time is an unnecessary economic cost: it means that advisers’ fees are higher and small businesses and others dealing with legislation (such as the “Mark Green” persona) spend more time than necessary tied up with understanding it.

Readers’ preferences are important, too. If legislation looks off-putting they may shy away from it, even if it is in fact comprehensible.

What readers prefer is not necessarily the same as what they understand best. And what readers think they understand best is not necessarily what they do understand best; rather it should be seen as a manifestation of preference. The point here is that measuring readers’ preferences among various drafting techniques is not, by itself, a route to measuring the effectiveness of those techniques. It is quite possible that the two are correlated but that is something that cannot be established without evidence.

Surveys of readers’ preferences have tended to produce quite general, impressionistic comments about the overall style of a document. It can be quite difficult to derive useful guidelines from that as readers rarely home in on a particular drafting technique. There have

been studies of the comprehensibility of legislation, comparing a whole Act with a version of it redrafted in plain English. Even if such a study can be used to show clearly how one version is easier to understand than the other, any results tend to relate to the whole of a version rather than particular techniques used in either version. Again it is difficult to translate those results into guidance about which particular techniques might be clear for a given proposition.

The object of the study was to compare various particular techniques and styles of drafting – and the aim was to do so in a way that made sure that participants actually engaged with legislation, rather than just reading it as a piece of prose. Whether people are more likely to *comply* with what they prefer or understand best is a separate question which the study did not seek to address.

Outline of the study

The National Archives funded the study as part of its regular user-testing; the study was conducted by Bunnyfoot Ltd. Its main object was–

- to find out whether it is possible to establish empirically whether some particular drafting techniques or drafting styles are better understood than others, and
- if so, to establish which techniques and styles are best understood.

This was done by means of–

- an *online survey* on legislation.gov.uk comparing small scale drafting techniques;
- *face-to-face user testing* designed, among other things, to compare other drafting techniques.

The three National Archives personas were central to both parts of the study; the online survey was carried out on the legislation.gov.uk website, whose readership is represented by those personas, and participants in the user testing were selected using criteria based on those personas. So, a further aspect of the study was to find out whether there are categories of readers who are an important part of the audience for OPC drafters but who do not fit any of the legislation.gov.uk personas.

The study began with a couple of sessions at OPC when drafters–

- identified the categories of reader for whom they write, to compare those categories with the legislation.gov.uk personas, and
- chose a handful of drafting techniques to test.

Online survey

The first part of the study was an online survey, designed to compare drafting styles. It lent itself to comparing ways of drafting quite short propositions.

The survey was part of one of The National Archives' regular surveys on legislation.gov.uk. Anyone who clicked onto that website over several days was invited to take part. Initially the survey appeared as a tab on one side of the home page; a few hundred people responded. For the final few days the survey was given far more prominence – anyone landing on the home page had to click past a pop-up invitation to take part in the survey – and there were far more responses. Participation in the survey was entirely voluntary.

The survey typically took more than 30 minutes to complete. Despite that, 1,901 people completed the survey and there were over 3,300 partial responses. Large numbers of people left comments or expressed their willingness to take part in further research.

The first part of the survey gathered data about participants.

The second part compared drafting styles for five topics. For each, OPC devised a short example (a subsection or two, or a short clause), and redrafted it in different ways. All the versions for each topic were intended to be examples of good drafting. Often, when a plain language version is compared with its predecessor version, the latter can appear grotesque and the plain language version obviously preferable. By contrast, the intention in the survey was that no version should be clearly “worse” than any other version in a way that might nudge participants to choose one rather than another. All the examples used were designed not only to be clear but also to provide certainty.

For each topic, participants were shown one of the versions, then asked a comprehension question; they were then shown one or two alternative versions (options) and asked “Which option do you feel would best support you to work out the answer to the question?” Finally they were invited to explain why they had chosen that option.

The comprehension questions were designed to require participants to engage with legislation in a way that they would have to do if applying it in real life.

The order in which participants saw the versions was rotated, so that different participants saw different versions before answering the comprehension question. However, there were some practical limitations. It was not possible to stop participants from going back and changing their answer to the comprehension question having seen the alternative version(s), nor was it possible to tell whether they had done this. It was also not possible to measure how long a participant took to answer the comprehension questions.

The topics tested and results are discussed in the next section. For each of the topics, however, the proportion of participants who answered the comprehension question for that topic correctly was broadly the same across the topic regardless of which version they were shown before seeing the comprehension question.

So the order in which participants saw the examples did not seem to affect significantly the likelihood of their answering the comprehension question correctly. But it is not possible to reach a firm conclusion on this because it was not possible to tell whether participants

changed their answers after seeing the other examples, and therefore whether the results would have been the same had they only seen the first example shown.

The five topics tested during the online survey

This section describes the five topics tested, records the material used, and discusses the findings for each of them.

Topic A: conditions

Examples

Option 1

Power of tribunal to impose financial penalty

Where an employment tribunal determining a claim involving an employer and a worker –

- (a) concludes that the employer has breached any of the worker's rights to which the claim relates, and
- (b) is of the opinion that the breach has one or more aggravating features, the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

Option 2

Power of tribunal to impose financial penalty

- (1) An employment tribunal may order an employer to pay a penalty to the Secretary of State where Conditions A to C are met.
- (2) Condition A is that the tribunal has determined a claim involving the employer and a worker.
- (3) Condition B is that the tribunal concludes that the employer has breached any of the worker's rights to which the claim relates.
- (4) Condition C is that the tribunal is of the opinion that the breach has one or more aggravating features.
- (5) It makes no difference whether or not the tribunal also makes a financial award against the employer on the claim.

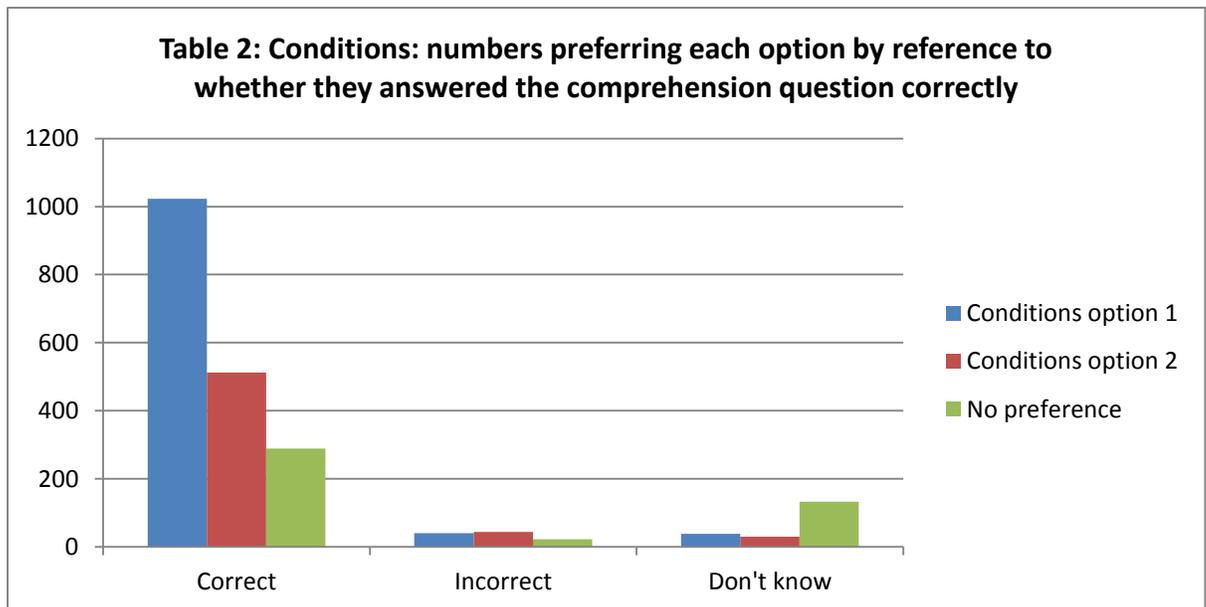
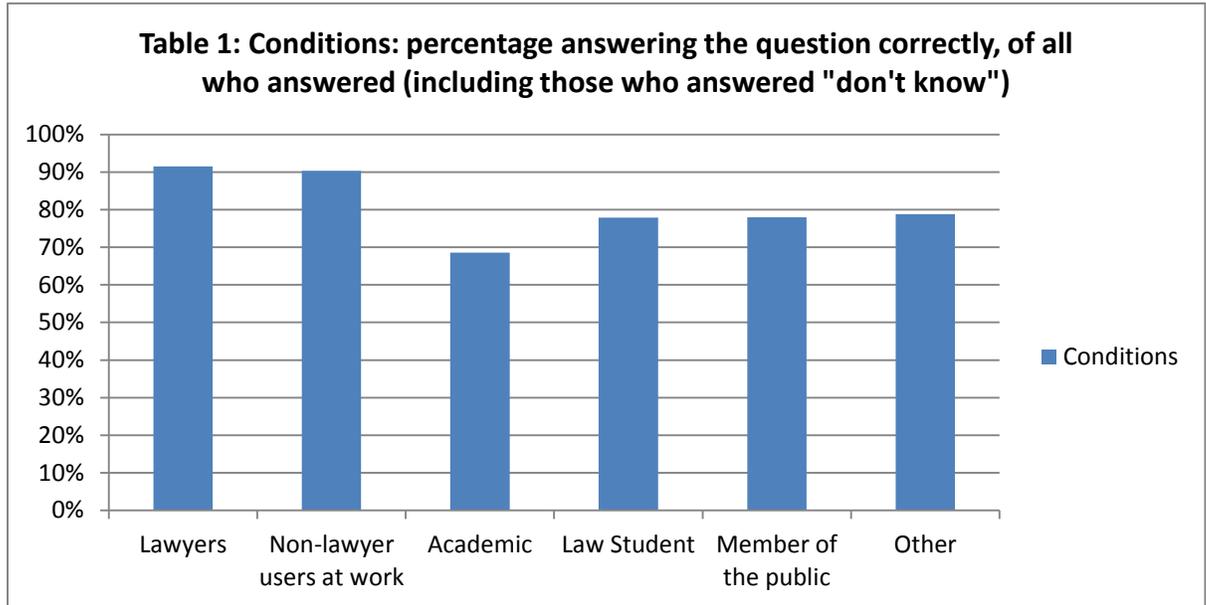
Question

Bob, an employee of Trevor, makes a claim against Trevor in the employment tribunal for not allowing him time off work for trade union activities. The tribunal makes a declaration that Trevor has infringed Bob's entitlement to time off for these activities, and orders Trevor to allow Bob the appropriate time off in future. The tribunal also finds that, in turning down Bob's request for time off, Trevor used abusive language, which it decides was an aggravating feature. However it decides not to order Trevor to pay compensation to Bob.

May the employment tribunal order Trevor to pay a penalty to the Secretary of State?

- Yes (correct)
- No
- I don't know

Results



Discussion

Option 1 sets out a tribunal's powers in a fairly typical way in a single sentence. Option 2 breaks down the proposition into a series of separate conditions. It is typical of a style that has been used a lot in rewritten tax legislation in the United Kingdom.

Most people, in all categories of users, answered the comprehension question correctly (overall, 85% of participants who responded). As described in the previous section, that proportion did not depend on whether they saw option 1 or option 2 first. However, the likelihood of answering correctly did depend on the category of user. Professional users at work who are not lawyers but are familiar with legislation (those who fit The National Archives' "Mark Green" persona) showed a high level of comprehension.

Table 2 shows that most people preferred option 1. Of the very few people who answered incorrectly (less than 4%), slightly more preferred option 2 than preferred option 1, but the numbers were probably too small for it to be possible to read very much into this.

Option 1 has what is sometimes referred to as a "leading" structure ("If A, B and C, then X") whereas option 2 has what might be called a "trailing" structure ("X if A, B and C"; the consequence appears first and is followed by the conditions that must be met in order for the consequence to apply). It is sometimes suggested by advocates of plain language that a trailing structure is clearer, but that was not matched by the results of the survey. In fact, it was clear from comments made by participants in the survey that the leading/trailing structure was only one of a number of factors and less important than the fact that option 1 was a single sentence and option 2 was broken down into a series of short sentences.

This highlights two points—

- the nature of language makes it extremely difficult to isolate a single factor for testing;
- the most appropriate structure in one context may not be the most appropriate in another. The study was testing comprehension and preference in a document written with a view to making the law as a whole as clear as possible. It was not concerned with providing the reader with an incentive to read on. It is possible that a trailing structure might be more effective in ensuring compliance, which might make it more appropriate for a document designed for the purpose of bringing about behavioural change (such as guidance or advertising) where a statement of the consequence at the outset might catch the reader's eye and provide a reason to read on.

One result of this part of the survey is that OPC's Drafting Guidance has been revised so that it no longer encourages the use of conditions in the form of option 2.

Topic B: Formulas

Examples

Option 1

In this Part, “scheme transfer factor” means the amount of any sums transferred on the scheme transfer reduced by the relevant relievable amount and then divided by the standard lifetime allowance at the time when the scheme transfer took place.

Option 2

Definition of “scheme transfer factor”

In this Part, “scheme transfer factor” means –

$$\frac{T - R}{S}$$

where –

T is the amount of any sums transferred on the scheme transfer,

R is the relevant relievable amount, and

S is the standard lifetime allowance at the time when the scheme transfer took place.

Option 3

In Part, “scheme transfer factor” means –

$$\frac{A}{B}$$

where –

A is the amount of any sums transferred on the scheme transfer minus the relevant relievable amount, and

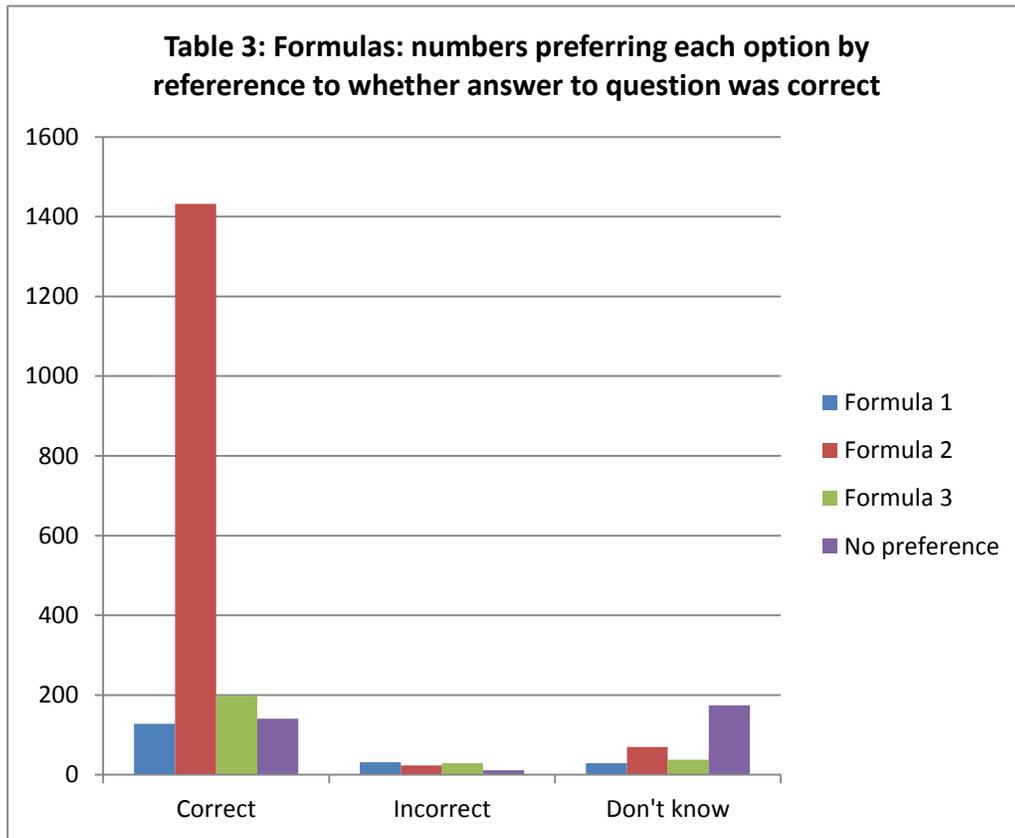
B is the standard lifetime allowance at the time when the scheme transfer took place.

Question

If the amount of sums transferred on the scheme transfer is £5,000, the relevant relievable amount is £1,000 and the standard lifetime allowance at the time when the scheme transfer took place is £200, what is the "scheme transfer factor"?

- 20 (correct)
- 30
- 4995
- or I don't know

Results



Discussion

Option 1 is purely narrative, option 2 is a straightforward formula and option 3 is a mixture of narrative and formula.

The vast majority of participants answered the question correctly and among those who did there was a very clear preference for option 2, the formula.

Interestingly, most of those who answered the question incorrectly actually preferred option 1 or 3 rather than option 2. Nevertheless, the numbers of incorrect answers were fairly small and the majority of those who preferred option 1 or 3 still answered correctly.

As a result of this finding, OPC's Drafting Guidance, which had previously advised caution in the use of formulas, has been revised to tilt the balance and support their use where the drafter considers it appropriate.

Topic C: “subject to”

Examples

Option 1

- (1) Subject to the following provisions of this section, the Chief Officer for Environmental Protection may direct a person to take specified steps in order to remedy the effects of contamination of land or water described in the direction.
- (2) A direction may only be given to a person under subsection (1) if, in the Chief Officer’s opinion, the person is responsible for the contamination.
- (3) The Chief Officer may not give a direction under subsection (1) unless he or she believes that direction is necessary –
 - (a) in the interests of the protection of wildlife;
 - (b) for the purpose of protecting one or more areas of woodland;
 - (c) subject to subsection (4), for the purpose of safeguarding the environmental well-being of the locality affected by the contamination.
- (4) A direction is not to be considered necessary on the ground falling within subsection (3)(c) unless the Environment Agency certifies that the steps which the Chief Officer proposes to specify in the direction are proportionate having regard to the effects of the contamination.

Option 2

- (1) The Chief Officer for Environmental Protection may direct a person to take specified steps in order to remedy the effects of contamination of land or water described in the direction.
- (2) A direction may only be given to a person under subsection (1) if, in the Chief Officer’s opinion, the person is responsible for the contamination.
- (3) The Chief Officer may not give a direction under subsection (1) unless the Chief Officer believes that the direction is necessary –
 - (a) in the interests of the protection of wildlife;
 - (b) for the purpose of protecting one or more areas of woodland; or
 - (c) for the purpose of safeguarding the environmental well-being of the locality affected by the contamination.
- (4) The ground mentioned in subsection (3)(c) may only be relied on where the Environment Agency certifies that the steps which the Chief Officer proposes to specify in the direction are proportionate having regard to the effects of the contamination.

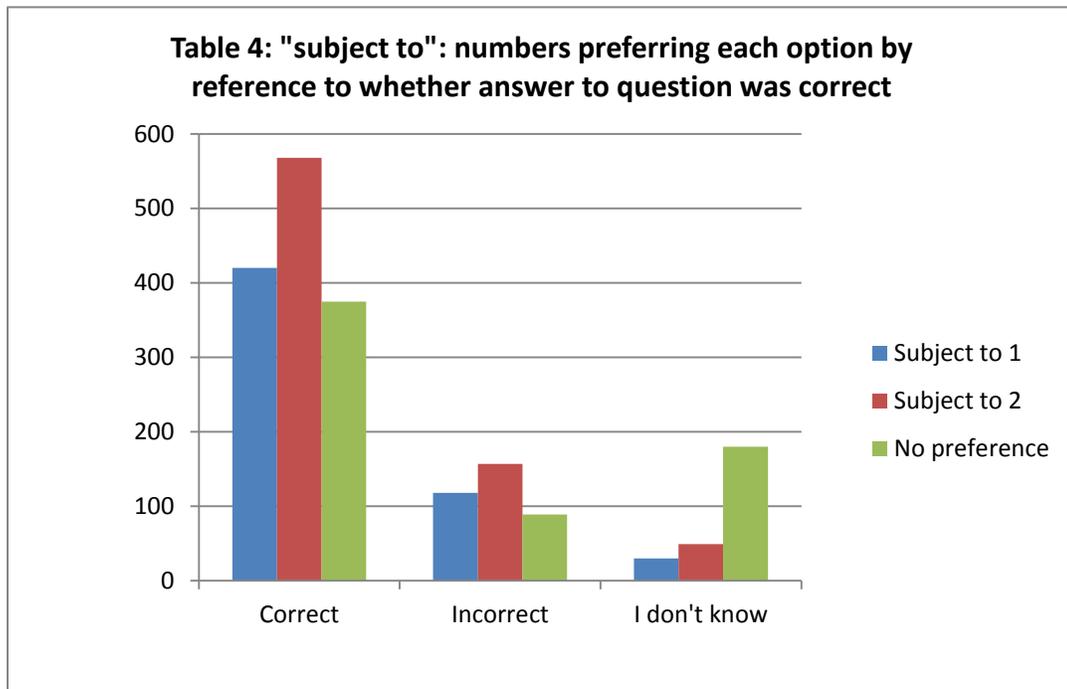
Question

An area of land has been contaminated. The Chief Officer for Environmental Protection believes that a direction is necessary for the purpose of safeguarding the environmental well-being of the locality affected by the contamination.

Can the Chief Officer give a direction (describing the affected land) to the person responsible for the contamination, specifying the steps to be taken to remedy its effects, without the Environment Agency certifying that the proposed steps are proportionate?

- Yes
- No
- I don't know

Results



Discussion

The examples deal with powers to give directions which are subject to qualifications. In option 1, the qualifications are indicated in subsections (1) and (3)(c) by the words “Subject to.....”; in option 2, the reader is not warned in subsections (1) and (3) that the powers to give directions are qualified and is therefore expected to read the whole provision.

The examples necessarily involve one proposition qualifying or elaborating another, so the examples were longer and more complex and fewer people got the answers right.

Although there was a marginal preference for option 2 it was not sufficiently marked to enable any conclusions to be drawn that beginning a proposition with the qualifying words “Subject to” either is helpful or is distracting and to be discouraged.

Topic D: “second sentences”

Examples

Option 1

- | |
|--|
| <p>(1) The Secretary of State may delegate to a person (“the delegate”) any of the functions of the Secretary of State under this Part by giving a notice to the delegate.
But the Secretary of State may not delegate –</p> <ul style="list-style-type: none">(a) a function of making regulations;(b) a function under this section. <p>(2) The notice must specify –</p> <ul style="list-style-type: none">(a) the functions that are delegated;(b) the extent to which they are delegated;(c) the conditions subject to which they are delegated;(d) the references to the Secretary of State in this Part that are to have effect as references to the delegate. <p>(3) The Secretary of State may give a subsequent notice –</p> <ul style="list-style-type: none">(a) revising or superseding the existing one, or(b) withdrawing the delegation of a function previously delegated. <p>(4) Functions may not be delegated under this section without the consent of the delegate.
This does not apply if the delegate is the Bubble Gum Research Council.</p> |
|--|

Option 2

- (1) The Secretary of State may delegate to a person (“the delegate”) any of the functions of the Secretary of State under this Part by giving a notice to the delegate.
- (2) Subsection (1) does not allow the Secretary of State to delegate –
 - (a) a function of making regulations;
 - (b) a function under this section.
- (3) A notice under this section delegating functions must specify –
 - (a) the functions that are delegated;
 - (b) the extent to which they are delegated;
 - (c) the conditions subject to which they are delegated;
 - (d) the references to the Secretary of State in this Part that are to have effect as references to the delegate.
- (4) The Secretary of State may give a subsequent notice –
 - (a) revising or superseding an existing notice under this section, or
 - (b) withdrawing the delegation of a function previously delegated under this section.
- (5) Functions may not be delegated under this section without the consent of the delegate.
- (6) Subsection (5) does not apply if the delegate is the Bubble Gum Research Council.

Question

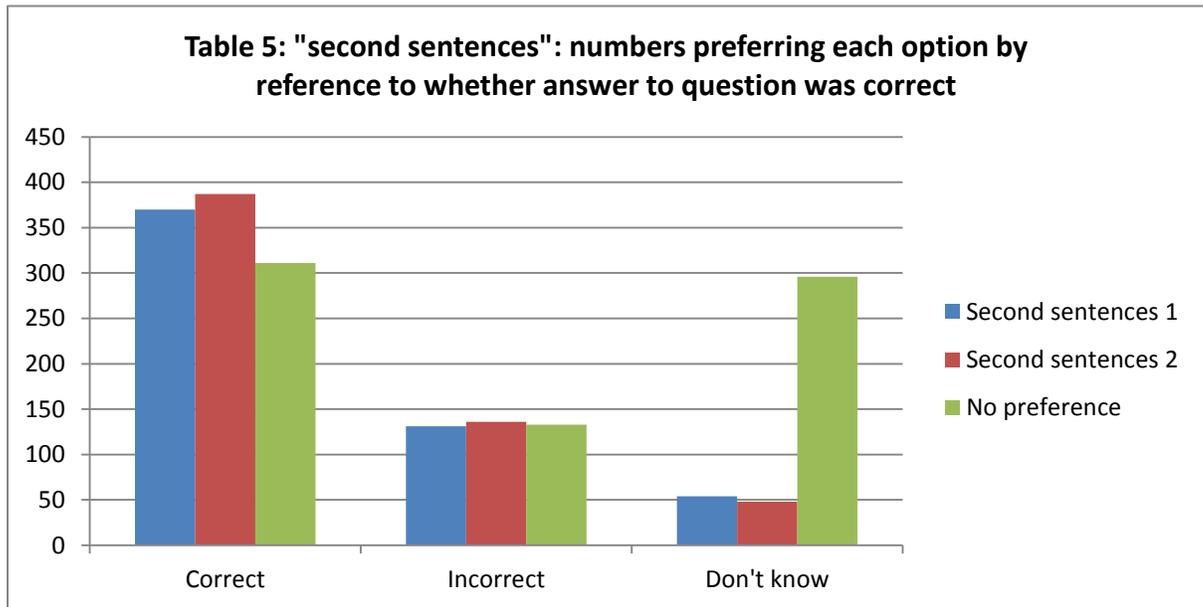
This section falls within Part 3 of the Act it comes from. One of the Secretary of State’s functions under that Part is to assess the suitability of bubble gum manufacturers for being granted a bubble gum licence. Another of her functions under Part 3 is to make regulations about bubble gum licences.

The Secretary of State wants to delegate to the Bubble Gum Research Council her function of assessing the suitability of bubble gum manufacturers for being granted a bubble gum licence, and also her function of making regulations under Part 3.

Which of these statements is true? The Secretary of State is allowed to delegate to the Bubble Gum Research Council:

- Both of these functions
- Only one of these functions
- Neither of these functions
- I don’t know

Results



Discussion

In the United Kingdom, sentences are the basic component of Acts. All Acts are divided into sections; sections may be undivided or may comprise a number of subsections. A subsection (including, for this purpose, a section that is not divided into subsections) is the main building block and generally consists of a single sentence. Thus, in general, each sentence in an Act is numbered.

Paragraphs and sub-paragraphs allow further means for separating out the subordinate components of a subsection, but they are not themselves sentences; rather, they allow the relationship between those subordinate components to be revealed.

Occasionally a second (unnumbered) sentence is used in a subsection. This happens typically where a subsidiary proposition is closely related to the first sentence or does not merit a subsection in its own right. A second sentence can be useful to signal, at the end of a subsection, that the subsection is subject to some other provision. This device offers a way to avoid opening the subsection with the possibly distracting, and certainly inelegant, phrase "Subject to subsection (x)".

The examples were designed to test whether the use of additional sentences, as in subsections (1) and (4) of option 1, were helpful or distracting. Again, no clear preference was shown for one style over the other. The proportions of participants who preferred option 1 and option 2 were more or less equal, regardless of whether they answered the comprehension question correctly, so a preference for one option over the other was not associated with better comprehension.

Topic E: “sandwich provisions”

Examples

Option 1

Offence in relation to export of prohibited or restricted goods etc

If –

- (a) any goods are exported or brought to any place in the United Kingdom for the purpose of being exported, and
- (b) export of the goods is, or would be, contrary to any prohibition or restriction,

the goods may be forfeited and any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

Option 2

Offence in relation to export of prohibited or restricted goods etc

Goods may be forfeited, and any person knowingly concerned in the export or intended export of goods is guilty of an offence, if –

- (a) the goods are exported or brought to any place in the United Kingdom for the purpose of being exported, and
- (b) export of the goods is, or would be, contrary to any prohibition or restriction.

Option 3

If any goods are exported, or brought to any place in the United Kingdom for the purpose of being exported, and export of the goods is, or would be, contrary to any prohibition or restriction, the goods may be forfeited and any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

(Option 4 was not tested.)

Option 5

(1) Subsection (2) applies if –

- (a) any goods are exported or brought to a place in the United Kingdom for the purpose of being exported, and
- (b) export of the goods is, or would be, contrary to any prohibition or restriction.

(2) The goods may be forfeited and any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

Option 6

- (1) Subsection (2) applies if –
- (a) any goods are exported or brought to a place in the United Kingdom for the purpose of being exported, and
 - (b) export of the goods is, or would be, contrary to any prohibition or restriction.
- (2) Where this subsection applies –
- (a) the goods may be forfeited, and
 - (b) any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

Option 7

- If –
- (a) any goods are exported or brought to a place in the United Kingdom for the purpose of being exported, and
 - (b) export of the goods is, or would be, contrary to any prohibition or restriction,
- then –
- (i) the goods may be forfeited, and
 - (ii) any person knowingly concerned in the export, or intended export, of the goods is guilty of an offence.

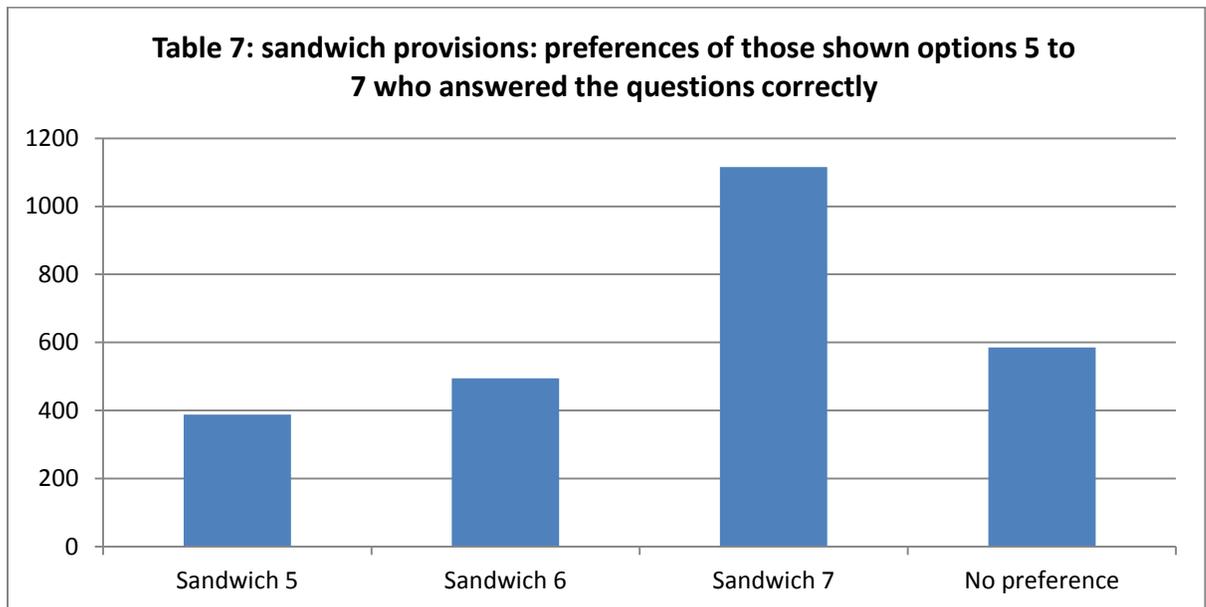
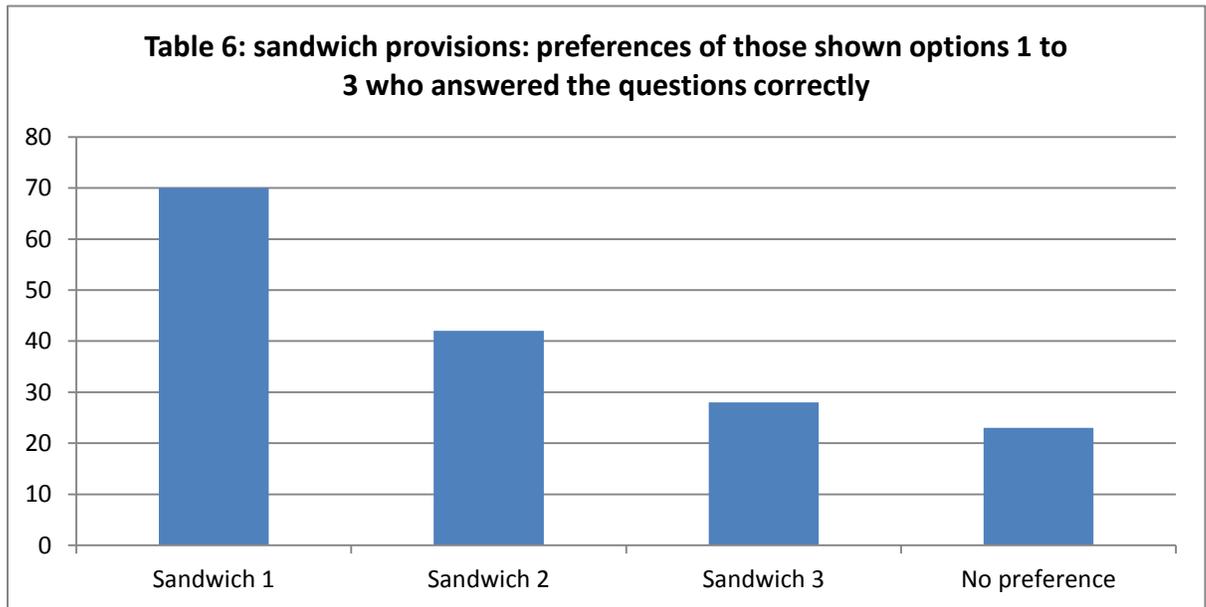
Question

David and Ian plan to export some counterfeit handbags to France. Ian packs them up and David drives them to the port at Dover so that they can be loaded on to a ship. The Counterfeit Goods Act 1994 prohibits the export of counterfeit goods.

Select the statements that are correct (you may select as many as you want):

- Neither Ian nor David is guilty of an offence
- David is guilty of an offence but Ian is not because he did not bring the handbags to a place in the United Kingdom for export
- The handbags may be forfeited
- Both Ian and David are guilty of an offence
- Ian is guilty of an offence but David is not
- The handbags may be forfeited, but only if either David or Ian is convicted of an offence
- The handbags may not be forfeited
- I don't know

Results



Discussion

The final topic was what are sometimes referred to as “sandwich” provisions – provisions which have full out words at the beginning and end, with the text broken into paragraphs in between. Typically these are discouraged, and double sandwiches (which end with further paragraphing) are one of the few structures that drafters at OPC were directed not to use.

Six options were tested, with a complex question. As a result, the results cannot be analysed in the same way as for the other topics – though at least 80% of participants gave the correct answers. Options 1, 2 and 3 were compared with each other, and then options 5, 6 and 7 (option 4 was not used). Because the prominence of the survey on the legislation.gov.uk website changed, far more people saw the second group of options.

Option 1 was a typical sandwich provision with the consequence at the end; option 2 put the consequence in the chapeau and option 3 was not broken down at all. The participants shown those options showed a preference for option 1 but the numbers were quite small (approximately 160 altogether).

Many more people saw options 5, 6 and 7 (approximately 2,500). The style of options 5 and 6 is typical of the tax law rewrite in the United Kingdom: “the [next sentence] applies if”; in option 6, the double consequence was split out.

Option 7 is a double sandwich - “If (a) and/or (b), then (x) and/or (y)” - of the kind that is deprecated by most reputable authorities on plain language. It is a rare case of a construction that OPC drafters were directed, rather than just recommended, not to use. Surprisingly, option 7 proved popular, clearly more so than either of the options compared with it.

The limitations of the survey did not allow a comparison across all the options. Nevertheless, OPC Drafting Guidance has been revised to tone down the caution against the use of sandwiches, and the preference shown for option 7 over options 5 and 6 was sufficiently marked for the direction in Drafting Guidance against the use of double sandwiches to have been relaxed.

A double sandwich construction will be appropriate only occasionally, and the cases where it is the most appropriate construction are likely to be fairly rare. But the results of the survey show that there are propositions for which a double sandwich construction is the clearest approach.

The particular example used in the survey contained two conditions of commensurate importance that could be expressed briefly and together gave rise to two conclusions of approximately equal significance. Often the complexity of one or other of the conditions or conclusions, or their different importance, will militate against this approach.

So the firm conclusion that can be drawn from this part of the survey is a narrow one: it provides evidence for changing a general direction against the use of double sandwiches but does not provide evidence for identifying when they should be used.

Face-to-face user testing

Face-to-face user-testing was used to test drafting techniques that did not lend themselves to the online survey format.

This part of the study was used to test whether dividing material between clauses and schedules made it more difficult to understand, and to compare staccato and narrative styles of drafting. “Staccato” here is used to denote a style of drafting which breaks a complex legislative proposition down into a series of short, undivided, sentences, each dealing with a single point, whereas a narrative style typically uses longer sentences, which may contain subordinate clauses qualifying the main proposition, and may make use of paragraphing to provide structure.

As well as the drafting aspects, The National Archives used the user-testing sessions to test various prototype aids to understanding legislation for legislation.gov.uk, for example a “hover over” feature to highlight definitions, and, in the table of contents for an Act, greying out sections which are not in force.

Bunnyfoot conducted 12 sessions of 90 minutes, each with a participant who had been selected as matching one of the three personas developed by The National Archives as users of legislation.gov.uk. The sessions were recorded and could be observed by a video link. Eye-tracking was used to monitor how a user approached material when looking at it online.

The dominant, and unexpected, finding was the striking level of difficulty that users of legislation have in making sense of it. This greatly outweighed any observations about how one drafting style compared with another. Readers seem to have very little grasp of how legislation is structured and organised. Their “mental model” of it is simply not very good. This was true not just for members of the public but for participants of all types, including some of the lawyers. The sessions certainly challenged a drafter’s assumptions about the audience for legislation.

For example–

- there was very little understanding of what it meant for a provision to have been enacted but not be in force, or of what the term “commencement” meant;
- a typical section introducing a schedule – “Schedule 2 makes provision about” – left more than one reader completely stumped; modern United Kingdom legislation would not use the italicised words in the expression “Schedule 2 to this Act”, but perhaps the desire to streamline has in this instance produced an unexpected outcome;
- even straightforward cross-references to “subsection (2)” or “paragraph 3” were a problem, not so much because readers had to interrupt the flow of their reading, as because they simply did not know what a subsection or paragraph was, so did not know what was being referred to;
- terms like “prescribed”, meaning “prescribed by regulations”, perplexed and frustrated most readers, some of whom were unsure what regulations were and did not know where to look for them;
- when looking at legislation online, readers tend to click straight through from the table of contents to the provision that appears from its title to be of interest, and may

well not look at the surrounding provisions that are needed to understand it properly – and which the drafter may assume that they will have read.

The user testing was intended to compare drafting styles, but what emerged from it was that the more pressing need is to help readers to “find their feet” when reading legislation.

Some of the difficulties identified could be tackled either by changes in drafting practice or by changes to the way that legislation is presented, and work on both approaches continues. It has provoked quite a radical rethink on how legislation is presented on legislation.gov.uk on which The National Archives and OPC have taken work forward together. And new legislative proposals⁶ have been considered to provide a means for legislation to read more straightforwardly.

As regards changes in drafting practice, a small number of discrete changes have been made to Drafting Guidance to reflect particular findings made in the study; for example drafters should now refer to a provision coming into force, rather than commencing.

But, more significantly, the study has provided a new awareness of readers’ difficulties and a renewed impetus to produce drafts that people might stand a chance of being able to understand. Drafters who observed any of the user testing sessions described them as “eye-opening” and “arresting”. Watching participants struggle with things that many drafters would take for granted as being intelligible left a profound impression.

Telephone interviews

Because participants in the online survey and the user testing sessions were largely confined to the personas developed by The National Archives, the study also tested whether those personas cover all the categories of people who use legislation or whether there are categories of people for whom drafters at OPC write who aren’t covered by them.

Drafters at OPC identified the following groups of users of legislation who do not at first sight clearly match any of The National Archives’ personas-

- Members of Parliament and Ministers
- Policy officials and Bill managers
- Parliamentary officials
- Lobby groups
- Judges
- Government lawyers
- Private lawyers who read legislation through subscription services

⁶ Clause 67 of the Deregulation Bill as amended in Public Bill Committee (House of Commons Bill 191 printed on 26 March 2014) would if enacted confer a power to allow references in an Act to, for example, “the date on which this section comes into force” to be replaced with the actual date once the section had come into force.

A small number of people kindly agreed to take part in 30 minute telephone interviews which were carried out by Bunnyfoot, and in which they were asked the same questions as had been used in developing the personas originally.

The outcome was that, with the exception of Members of Parliament (including Ministers), users in all the categories identified matched one or other of the existing personas. So far as Members of Parliament are concerned, the information at this stage is quite sketchy and further research would be needed before it would be possible to make any generalisation.

The interviews highlighted the raft of information that is produced alongside every Bill, including Explanatory Notes, House of Commons briefings for Members, impact assessments and memoranda about particular aspects of the Bill, such as human rights, and powers delegated to Ministers and others.

Reflections on the study

Not surprisingly, the survey did not produce conclusive evidence that any one drafting style is generally clearer or better understood than another.

One reason is the difficulty of identifying a particular drafting style so that it can be tested in isolation without other factors impinging. And the study could only test a single set of examples for each drafting style. As every drafter knows, every context is different; what is clearest in one context or one kind of situation may not work so well in another context where other factors may be more important.

While the order in which a person saw differently drafted examples of the same proposition did not seem to affect the person's understanding (measured by being able to answer the comprehension question correctly), and the survey was able to identify which style was preferred by those who understood the proposition, that does not *prove* that the preferred style made it more likely that the person would understand the proposition. Further work would be needed for that. Nevertheless it seems reasonable to give some weight to the preferences of those who got the right answers.

Even though the study did not produce positive evidence in favour of general rules that some drafting styles should be used in preference to others, it did provide some evidence *against* general rules that some drafting styles *should not* be used.

The results suggest areas where further research might be profitable.

As already mentioned, it is not the purpose of this article to consider whether legislation ought to be written principally for judges and trained lawyers. In fact, members of the public reading legislation require certainty and clarity just as much as lawyers and judges; all the examples tested were designed to meet those requirements. While some lawyers are highly skilled and very experienced users of legislation, it was evident from the user testing that many lawyers struggle with it at least as much in reading legislation as a lot of non-lawyers.

The examples used were not drafted with particular audiences in mind, but, with one exception, none of the examples was significantly longer than those with which it was compared. The exception was option 2 of the conditions topic, which was markedly less popular than the shorter option.

Together these suggest that the question whether drafters should focus on a primary audience of trained lawyers may be hollow, anyway. It is possible that legislation written principally to meet the requirements of even the most highly skilled judges and lawyers may not in fact be different from legislation written to be as clear as possible for a wider audience. Although the study does not provide evidence for it, the findings are compatible with this proposition.

A more significant working hypothesis suggested by the study is that expressing a proposition in a single sentence, using the layout (including paragraphing) to show its structure (and what is subsidiary), with plenty of white space to make this readily apparent, will often be clearer than breaking the same proposition down into a series of shorter sentences.

A disadvantage of breaking a proposition into shorter sentences (typically, in legislation, a series of subsections) is that part of the reader's attention is diverted from the main proposition into understanding—

- each of the shorter propositions as a proposition in its own right, and
- how those propositions are to be assembled.

In effect, the drafter is introducing a joint into the main proposition and, in order to understand the main proposition, the reader has to understand both the constituent parts and how the joint works.

Another disadvantage of breaking a proposition into a series of shorter unparagraphed sentences, in the form of a series of subsections, is that each runs from the left margin, so all appear to have equal significance and it is not readily apparent how they are related. In a longer sentence, or subsection, paragraphs and sub-paragraphs can be used to show how the components are related.

The results of the study cannot be said to provide evidence *for* this working hypothesis, but tested against it, none of them is inconsistent with it. Indeed, it could perhaps be said to explain the clear preference for the double sandwich option in the sandwich provisions test.

Three final observations

The previous section considered what was learned *from* the study. This article concludes with some observations *about* the study.

- An online survey of the kind described in this article can clearly be a very effective way of comparing two drafting styles – where the comparison can be done using quite short examples.

- An abundance of feedback is available from readers of legislation.
- User testing may produce startling results. Unexpected observations, which may have nothing to do with what is being measured, may turn out to be the most potent and thought provoking.

It would be difficult to overstate the profound sense of realisation with which drafters observing the user testing sessions came to recognise the difficulties that ordinary readers have in reading ordinary legislation.

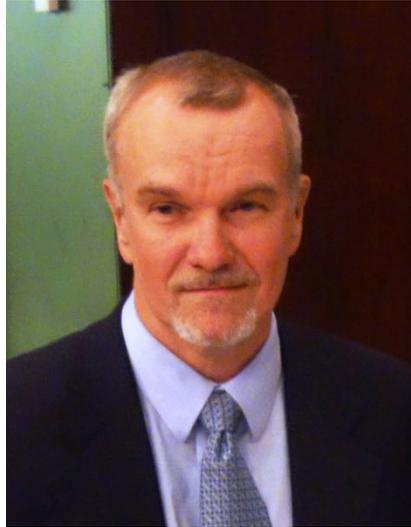
Acknowledgements

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The Do's and Don'ts of Dealing with Instructing Officials

Paul Salembier¹



Abstract

This article examines the working relationship between legislative counsel and instructing officials, drawing on the author's experience in both roles. It provides suggestions on how legislative counsel can ensure that this relationship is productive, particularly through the judicious use of information technology, tactful treatment of client drafting and attention to client feedback.

Introduction

I spent over a dozen years as a legislative counsel with Canada's Legislative Services, but for the past decade my job has been to advise on the development of legislation for the Canadian ministry that deals with Aboriginal affairs. As such, while I still do a lot of drafting, I now frequently find myself in the position of an instructing official. This presentation draws on the perspective I have gained as a former legislative counsel who is now on the other side of the table.

It's not uncommon to hear legislative counsel observe that "poor instructions are a huge problem" and complain of "rotten instructions". The purpose of this presentation is to hold up a mirror in which legislative counsel can see how they are perceived by instructing

¹ Paul Salembier is the author of *Legal and Legislative Drafting* (LexisNexis: 2009), an adjunct professor of Legal Drafting at the Faculty of Law, University of Ottawa and formerly a General Counsel with the Department of Justice (Canada).

officials. Some may like what they see, and preen accordingly. For others, it may be something of a bad hair day.

I am going to start out with a few minor observations that I think can assist legislative counsel in their dealings with instructing officials. I will then move onto what I believe are some more serious observations about how drafting offices might improve the manner in which they operate.

As an initial observation, for many instructing officials, being able to participate in the development of legislation is a high point in their careers, a chance to see their policy ideas embodied in the law of the land. They will approach their task with enthusiasm, vigour and, in some cases, a certain sense of awe. Because of this, working with a good legislative counsel can make the experience one that affirms their choice of public service as a career, while a bad one can leave them cynical about the entire law-making process. The goal of my presentation is to share some recommendations that might encourage the former, and make the latter less likely.

Use technology judiciously in meetings with instructing officials

It goes without saying that technology has revolutionized legislative drafting. It allows us to quickly modify and reprint draft legislation, so that client ministries now expect to receive 57 drafts of every bill, and not just 5.

At its best, this technology can allow us to quickly update a draft bill in response to feedback from instructing officials, and instantly provide them with a copy of the updated bill that they can take away with them from the drafting meeting, to impress their superiors and Ministers.

I started my drafting career in 1990, when Canada was in the midst of the transition from pen and paper drafting to computerized drafting, and I was usually on the crest of the technology wave as it transformed our processes. So I was, and still am, a fan of computerized drafting.

There is a downside to this technology, however, and it manifests itself in two different ways.

The first has an impact on the client's experience. In Canada we've spent millions of dollars on custom-built drafting software, and we've outfitted specialized rooms where French and English legislative counsel can work side by side, with extra monitor screens across the tables so that instructing officials can follow the legislative counsel's progress as they work. In other situations, real-time drafting might take place with legislative counsel working on a laptop during a meeting with instructing officials and providing them with an electronic or paper copy at the end of it. And as I've mentioned, under optimum circumstances this can produce impressive results.

What many legislative counsel don't realize, though, is that even the most sophisticated technology isn't appropriate for all circumstances. There are many situations where even the most experienced legislative counsel can take a long time to make a change on an electronic document, and in more cases than I care to remember I have waited for 10 minutes or more while a legislative counsel tried to figure out how to move a heading or how to change a subsection into a section. In some of the worst cases, I have sat while a legislative counsel typed notes to himself about every little thing, like "instructing officials suggest changing *must* to *may*, because provision is discretionary, not mandatory", rather than just changing the word in the text itself and moving on.

And during all this time the instructing officials are sitting, twiddling their thumbs, and waiting impatiently to move on to address the next substantive issue.

In cases where legislative counsel are inexperienced with the drafting software, or where they lack the confidence to make changes on the fly (and therefore want to make notes to themselves for later reference), I would suggest an alternate technology that would work better for them. It's called paper. You bring a paper draft to the meeting, mark changes on it in red pen, and struggle with the drafting software or your writer's block in the privacy of your own office. In other cases, a hybrid combination of computer screen changes made on the fly and other changes or questions noted on a paper draft may be the best option, and this in fact is my preferred way of working. While I make most changes to a paper version – which I can usually do much faster than typing them in – I also have the draft of the text on a laptop, enabling me to do searches, to access other legislation or related materials, and to copy text to it if necessary.

The second reason to be wary of a purely electronic approach to drafting relates to the quality of the legislation produced. I don't know how many dozens of times as a legislative counsel I've agreed to a change in a meeting with instructing officials, made a note of it on a paper draft, and then later, when reviewing my notes and doing the actual drafting in my office, I've discovered that the change does not work. The problem with purely electronic drafting is that the change gets made on the fly, a draft gets printed, and the legislative counsel may never go back to spend any time reflecting on the change and may therefore never discover that it doesn't work – or do so only at a later date when reversing things can lead to complicated flow-on implications elsewhere in the draft.²

In summary, therefore, I would suggest that an over-adherence to an electronic approach to drafting is not always the most efficient way to work, and not the most effective way to serve your instructing officials.

² A further minor advantage that I find to having marked up paper drafts is that it is easier to go back and find out how and why a particular change was made, even if it was done several drafts ago and many months earlier. When I've inputted any changes marked on a paper draft, I also scan the draft into an electronic pdf document, so I have a record of my written changes available on my computer as well.

Marking Changes

I can say without reservation that legislative counsel should always mark changes made from one draft to another. Most commercial word-processing programs have a “track changes” feature that can automate this. Even custom drafting software should have a highlighting feature that can be used to mark new text.

Believe me, clients will thank you for this. There is nothing more maddening than comparing two drafts of a 20-page document trying to determine which two lines were changed from one version to the next.

The practice of marking changes goes beyond simply making the client’s life easier, though. It can avoid serious, and sometimes embarrassing, errors. In two recent cases, last minute changes were made to bills without advising the client ministry, and both cases caused problems.

In the first case, the legislative counsel made a change that didn’t technically alter the meaning of the provision, but nonetheless gave it a very different political flavour, and caused an uproar that the Minister had to answer to in Parliament.

The original version of the provision in question conferred a power to make regulations to:

provide for the relationship between the regulations and aboriginal and treaty rights ..., including *limiting* the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights;

Perhaps in an attempt to be more concise, the legislative counsel dropped the word *limiting*, resulting in the following regulation-making power:

provide for the relationship between the regulations and aboriginal and treaty rights ..., including the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights;

Now from a purely grammatical point of view, the “including ...” clause in the second version accomplishes the same objective as the first, but by taking out the word *limiting* it gives equal weight to the possibility that the regulation-making power could *expand* any abrogation or derogation of rights, as well as *limit* them.

The mere suggestion that the government might do this caused a furor in the aboriginal community and amongst Parliamentarians representing their views. Had the legislative counsel indicated to the instructing officials that he had deleted this word, the potential implications would have been immediately understood and the word *limiting* would have gone back in. In the circumstances he did not, and none of the instructing officials – me included – noticed that one word had been dropped from a 10-page Act just before it went to print.

This is not the only time a deleterious last-minute change was made, though in the other case³ we did not find it until the bill had been enacted, and thereafter had to rely on the French version (which had not been changed) for the correct statement of the law.

The moral of this story is that marking changes is not just something that legislative counsel should do to make life easier for their instructing officials; it will also result in better legislation.

Working with a client's initial draft

Some jurisdictions allow client ministries to present an initial draft to legislative counsel. At the federal level in Canada this is permitted for regulations, though, somewhat surprisingly, not normally for bills. For those jurisdictions that do not permit client ministries to take a crack at producing a first draft of legislation, I would recommend that they give it a try, because the practice can be very efficient from the point of view of the drafting office. Because writing things out forces the instructing officials to completely think through their policy, legislative counsel are much less likely to be faced with a policy gap in the middle of the drafting process. Some instructing officials even have a good grasp of legislative style and grammar, and I've seen drafts that required nothing but the most cursory editing before being made into law.

Other instructing officials, however, have difficulty drafting, and though the drafting process within the client ministry succeeds in getting them to think through the details of their policy, the way in which they have put together their initial draft can leave much to be desired. In these drafts, it is often very hard to figure what legislative rule a particular provision is in fact trying to put in place. Though such drafts require more work by legislative counsel, they can still be a very efficient manner of receiving drafting instructions.

When encountering a draft such as this, I would suggest that it is a mistake for the legislative counsel to completely redraft the text and put this new draft before the instructing officials at the legislative counsel's first meeting with them. First, it is a matter of common courtesy that when someone has spent time and effort to prepare something, it should not be peremptorily rejected or ignored. Many instructing officials will perceive the fact that you have thrown their draft in the dustbin as an insult, sending the message that they have been playing out of their league and should not have bothered wasting their time working on a draft. Even if this is true, you will have started your relationship with your instructing officials on a very bad footing.

A second and equally problematic aspect of substituting a completely new draft for the client's draft is that, in making significant changes to ambiguous provisions, the legislative

³ Moving a modifying phrase with the legislative sentence changed its object and hence the meaning of the provision.

counsel must necessarily act on his or her assumptions regarding the intent of those provisions and will sometimes guess wrongly. Incorporating mistaken assumptions into a completely new draft also makes the legislative counsel appear presumptuous in the eyes of client officials.

I have worked on files in which the legislative counsel took months completely rewriting an original draft, getting most of it entirely wrong, before presenting it to the client ministry. The client ministry then told them to go back and start again with the original draft. Because many of the legislative counsel's assumptions were wrong, a lot of time was wasted in backtracking to the original language as a starting point for further development of the text.

The way to avoid this is simply to table the client ministry's initial draft at the first meeting, and to discuss the provisions drafted by the instructing officials at this meeting. The legislative counsel can ask any questions about ambiguous or indecipherable provisions at this time, and by doing so, will avoid making incorrect assumptions and wasting time pursuing legislative blind alleys. At this meeting, legislative counsel can also signal that certain provisions of the initial draft will require significant redrafting, which will make the ministry officials much more receptive to the next, heavily modified, draft that the legislative counsel produces incorporating those changes.

Monopolistic Practices

I would now like to shift gears, and address some issues about relations with instructing officials that flow from the very nature of most drafting offices.

In Canada, as in many Commonwealth countries, the government drafting office – which I will refer to as the Legislative Counsel Office for the sake of convenience – has a monopoly on drafting services. Except in very rare circumstances, government bills are produced by the Legislative Counsel Office and by no one else. This monopoly has several implications for instructing officials and client ministries.

Monopolies⁴ exhibit certain characteristics:

1. First, they operate behind **high barriers to entry**. A barrier to entry sometimes arises out of a government fiat prohibiting others from entering the same line of business. The fact that others can't participate lets the monopoly determine what quantity of service will be provided and set the price for it.
2. A second characteristic is **price inelasticity** – because it is the only source to meet market demand, the monopoly can charge a fixed price for even inferior services (sometimes referred to as an ability to maintain super-normal profits).

⁴ <http://en.wikipedia.org/wiki/Monopoly>;
http://www.economicsonline.co.uk/Business_economics/Monopoly.html;
<http://www.buzzle.com/articles/characteristics-of-monopoly.html>

3. A third characteristic is **operational inefficiency** – because of their domination of the market, the monopoly does not face the same pressures to innovate as do firms facing competition.

Because most governments require that legislation be produced by the Legislative Counsel Office alone, those offices tend to share these characteristics. Each of them has an impact on the services drafting offices provide to client ministries, and I'd like to focus on one or two areas in which this has a particular impact.

Level of service

Because it has no competitors for its services, a Legislative Counsel Office is not compelled by market forces to deliver the highest level of service possible in order to retain its customer base. While I am certain that every Chief Legislative Counsel in this room *wants* to provide nothing but top-notch service, and while many legislative counsel are consummate professionals and a joy to work with, it's an inescapable fact that half of every group is made up of below-median performers.⁵ It is this group – or more particularly the outliers at the bottom end of the range⁶ – that causes most of the headaches for instructing officials.

Part of the reason for this relates to the dynamics of operating any large drafting office. To begin with, any large drafting office will inevitably have a turnover of staff – something that is particularly true now that baby-boomers like me are retiring in droves. As a result, every drafting office has an ongoing challenge to train new legislative counsel, and during the period that they are being trained and in their formative years – estimates vary from 5 to 10 years to bring a legislative counsel to the expert level – there is a risk that those counsel will produce draft legislation that is of less than optimum quality.

During the period that new legislative counsel are learning their trade, it is the client ministries that are on the receiving end of this less-than-optimal output, and because government drafting offices are monopolies, client ministries can't go anywhere else for service and are, in essence, without recourse.

Testing

Now, most drafting offices employ a number of mechanisms for training junior legislative counsel, which include mentoring and a review of drafts by more experienced legislative counsel. They also usually provide some form of formal training sessions, and these are what I want to focus on for a moment.

⁵ Or at least, below-median performers.

⁶ Drafting performance likely most closely follows the Pareto principle, whereby the bottom 20% of performers cause 80% of the problems.

There is a key difference between the kind of drafting training that I provide at the University of Ottawa and that typically provided to government lawyers – and that difference comes down to testing. My university students pay close attention to what I teach, and study the textbook, because they know they are going to be tested on it later. It is rare, on the other hand, for government lawyers ever to be tested on training material presented to them.

Now, intuitively we can conclude that, human nature being what it is, people will pay more attention to a lecture if they know they will be tested on it. This has been backed up by recent studies published in the journal *Psychology and Aging*, which showed that regardless of age, people learn more when they are tested.⁷

There are at least a couple of reasons why organizations forego the apparent advantages that testing brings to training programs. One is that testing is more labour intensive – it takes time, and marking tests requires much more effort from a trainer than simply delivering a seminar. Another is that adults tend to be test-averse, thinking that they have left all of that behind when they finished college, and therefore complain at the prospect of testing. I would suggest that there is a third factor at play, which is simply that drafting offices – and likely by extension Attorneys General Offices as well – lack the rigorous adherence to professional standards that is exhibited by organizations like the military. No one puts a pilot in charge of a new plane just taking the pilot's word for it that he or she attended the training course and has read the manual. Instead, the military tests pilots rigorously before letting them sit in the pilot seat. I would suggest that this sort of oversight would be of benefit to the drafting community, which is why in the training I give from time to time to legislative counsel I offer testing as an option.

In addition to the fact that incorporating testing into the training of legislative counsel will assist them in retaining more of what they are taught, another advantage of testing is that reviewing test results can help Chief Legislative Counsel to identify candidates for legislative counsel positions who may simply be lacking in the necessary aptitude to ever be competent in the field. The ability to weed out underperformers gives Chief Legislative Counsel and other managers an additional tool in their arsenal to guard against the type of deterioration of services that is characteristic of monopolies.

Customer feedback

One final tool to improving service to clients is a simple one, but one that is far from universal in practice. I mentioned earlier that because of the price inelasticity inherent in a monopoly position – where a low level of service won't automatically result in a lost

⁷ R. Nauert, "Being Tested on New Material Just As Important for Older Adults", <http://psychcentral.com/news/2013/03/08/being-tested-on-new-material-just-as-important-for-older-adults/52348.html>

customer – monopolies do not have to be as conscious of customer satisfaction as do firms in a competitive market.

And because customer satisfaction isn't important to maintaining market share, monopolies tend to pay less attention to customer feedback. For any organization that wants to maintain a high level of service, though, customer feedback is essential.

For a Legislative Counsel Office, soliciting customer feedback is as simple as sending the client ministry a client satisfaction questionnaire at the end of every drafting file. These questionnaires can include questions like:

- What did we do well?
- What can we improve on?
- Were drafts provided in a timely fashion?
- Were changes indicated from draft to draft?
- Was there something we didn't do that you would have liked us to have done?

For a drafting office to benefit from customer feedback, moreover, responses to the questionnaires have to be reviewed by a manager, and any perceived deficiencies need to be followed up on. For this reason, a client satisfaction questionnaire should finish by asking whether the instructing official would like a manager to call him or her to follow up on anything in the questionnaire.

Sometimes a negative review is simply a result of unrealistic expectations by instructing officials or a misunderstanding of some aspect of the drafting process. These sorts of things can often be dealt with simply by a call to the instructing official, providing the necessary explanation. Sometimes, simply the making of such a call will go a long way to improving relations with a client ministry.

In other cases, it might point to a need for more training for a particular legislative counsel, or even a change in drafting office procedures. The end result, however, will be an improvement in the service provided by the Legislative Counsel Office.

Concluding Remarks

We all pride ourselves in being professionals, in having unique skills and exercising them in a competent manner. Because of turnover in legislative drafting offices, competence is a moving target, and meeting the needs and expectations of client ministries is an ongoing challenge.

Adopting practices that make life easier for instructing officials and improving the performance of underperformers will improve the perception of Legislative Counsel Offices in the eyes of client ministries.

In the retail service industry, it is said that a satisfied customer will on average tell one other person, while a dissatisfied customer will tell 6 others. Avoiding dissatisfied instructing officials will therefore go a long way to improving a Legislative Counsel Office's relations with instructing officials, and will, incidentally, result in better legislation.

Book Review

***Modern Legislative Drafting*, by Dr. Muhammad Majibar Rahman, published by Scholars' Press, 2013**

***Reviewed by Eamonn Moran*¹**

Dr. Rahman's text *Modern Legislative Drafting* is based on a thesis written more than 10 years previously.

For a reader seeking a broad insight into the world of legislative drafting, this short text (207 pages) should prove valuable. The author is an experienced legislative counsel who understands well the demands on them and the challenges that they face in their working environment.

The book covers the nature of legislative drafting and how it relates to general legal drafting. There is a useful discussion of the nature of and necessity for legislation and also a comparison of common law and civil law systems. There is a very good description of the qualities that legislative counsel are required to have: problem solving skills, general legal skills, writing skills, interpersonal skills, learning skills, resilience and self-awareness. There is also an interesting discussion on the role of legislative counsel in policy development with recognition given to the value which an experienced legislative counsel can add to the policy development process.

The organisational arrangements for drafting in various jurisdictions are examined (Bangladesh, India, Pakistan, Sri Lanka, Gibraltar, New Zealand, Australia, Ireland, the United States and the United Kingdom) and there is a critical review of the drafting styles and techniques used in those jurisdictions as well as at the federal level in Canada.

The text contains a useful discussion on the nature of the legislative sentence, punctuation and word-choice and an excellent exposition of the principles of plain language drafting.

The book would have greatly benefited from thorough editorial review prior to publication. It contains numerous grammatical errors and spelling mistakes which are distracting to the reader. I would have also preferred to have seen it written in a gender-neutral style.

I also found myself in strong disagreement with the statement at page 150 and elsewhere that using a section heading starting with a section number reflects a style of 18th century legislative drafting.

It is always dangerous to offer a model redraft of existing legislative provisions. The book has quite a number of these. While the redrafts contain many improvements over the originals they themselves are not without fault. In the Canadian example the policy is changed considerably. The redraft of section 8(1) of the *Australian Electronic Transactions*

¹ Barrister and Consultant Legislative Counsel, Melbourne, Australia.

Act 1999 converts a provision to the effect that a transaction is not invalid only because it took place wholly or partly by means of one or more electronic communications into one that makes a transaction valid if it takes place wholly or partly by any electronic communications.

As a strong advocate of “must” I found myself in disagreement with the view expressed by the author at page 102 that “shall” is preferable in creating offences while “must” is appropriate for imposing non-punishable obligations.

Despite these issues I do believe that this book is a valuable addition to the available literature on legislative drafting. The fact that it is written by an experienced practitioner adds greatly to its worth. Dr. Rahman is very familiar with the environment in which legislative counsel operate and is deeply aware of the stylistic debates that we have been having for the past 30 years or so.

This book gives an interesting overview of the history and nature of legislative drafting and contains valuable advice on language and sentence structure. The fact that a reader may find himself or herself in strong disagreement with some things written in it only adds to its merit as it keeps the reader focussed and interested.

I recommend this text as a valuable addition to the library of any legislative drafting office.
