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Editor's Notes

This edition of the *Loophole* exemplifies its unique character as a journal devoted to subjects that few outside the community of legislative counsel can appreciate. Although legislation is perhaps most often considered in terms of the vast sweep of its substance and the policy objectives that underlie it, legislative counsel know well that there is much more. In addition to wrestling with the big ideas, we pay attention to the many little things that help readers understand the texts we draft. These things go largely unnoticed, which is as it should be. They help provide the transparency needed to communicate the substance of legislation and minimize distractions and annoyances that would otherwise burden the reader.

This issue contains two articles based on presentations at the 2011 CALC Asian Regional Conference in Colombo, Sri Lanka on 29 September 2011. The first is John Leahy's consideration of the editorial role of legislative counsel, how publication and revision powers can be used to "Perfect the Product". He provides a comprehensive and soundly reasoned account of these powers as well as the risks to be navigated in using them.

The next article by Paul O'Brien was first presented at the 2011 CALC Conference in Hyderabad where he regaled his audience with the drollery of recently developing practices in drafting titles for statutes. His article is framed not only as a critical account of these practices, but also as a commentary on what titles reveal about the national psyche of each jurisdiction. It is often amusing to have a mirror held up to your face to tell you what you look like, and I must say I was amused at the portrait of the "quirky" Canadians.

From editing and titles, we next turn to some quite fundamental questions about drafting against a backdrop of cultural and linguistic diversity in the South Pacific. Lalatoa Mulitalo examines what legislative counsel practising in societies with plural legal systems need to appreciate in terms of the historical background, norms, traditions and languages spoken in communities such as her native Samoa. Her paper discusses the challenge to integrate these aspects into the dominant governmental, legal and parliamentary systems that have been established in modern times.

Eamonn Moran rounds out this issue with another article from the 2011 Asian Regional Conference. He looks at the career path of legislative counsel framed by Shakespeare's account of the seven ages of man in *As You Like It*. There are, however, some notable differences between Eamonn's account and Shakespeare's. Career paths for legislative counsel may lead in different directions, which is a good thing since drafting offices need a variety of complementary skills to work as an effective whole. Secondly, the ultimate age for a legislative drafter in not nearly so bleak as Shakespeare's. Chief legislative counsel generally retain their teeth, eyes, taste and much else.

This issue concludes with two reviews of recently published books that may be of particular interest to legislative counsel.

John Mark Keyes

Ottawa, November, 2012

Upcoming conferences

2013 CALC Conference: 30 Years of the Winds of Change

Cape Town, South Africa – 10 to 12 April 2013

The CALC conference next year in Cape Town takes its main theme from CALC's history, which began with a resolution at an international gathering of legislative counsel in Hong Kong on 21 September 1983. Thirty years and 11 conferences later, the 2012 Conference is shaping up to bring legislative counsel together from throughout the Commonwealth and beyond.

The conference will begin with sessions looking at the evolution of drafting technique and the influence of the Plain Language Movement over the past 30 years with a view to considering its continuing development into the future. Other dimensions of legislative drafting to be explored include:

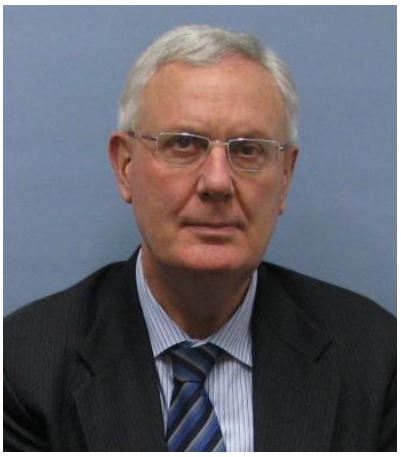
- Impact of Development Assistance on Legislative Drafting,
- How Information Technology has Changed Legislative Drafting,
- Development of Legislative Drafting Skills,
- Legislative Sovereignty and the Globalisation of Law,
- Government Context for Legislative Drafting.

The conference will conclude with a Master Class session featuring some of CALC's most gifted legislative counsel.

Keep an eye out for additional conference details on the CALC Conference webpage (http://www.opc.gov.au/calc/conferences.htm).

Perfecting the Product: Advantages and Limitations of Legislative Editorial Powers

John Leahy[1]



Abstract:

This paper examines the availability and use of powers to make editorial amendments and revisions to legislation, and in particular their advantages and limitations.

Introduction

Editorial powers have been used in Australia in the publication of legislation for over four decades. Legislative editorial powers exist in various forms in most, but not all, Australian jurisdictions.[2] The extent of the powers varies from jurisdiction to jurisdiction and has varied over time.[3] The extent to which editorial powers have been used in different Australian jurisdictions has also varied from time to time even if the powers have remained unchanged.

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[1] PSM SC, Principal Legislative Counsel, Australian Office of Parliamentary Counsel, Canberra Australia. This article was presented at the 2011 CALC Asian Regional Conference in Colombo, Sri Lanka on 29 September 2011.

[2] *Interpretation Act 1987* of New South Wales (NSW), s 45D(3)(a) and s 45E (see www.legislation.nsw.gov.au); *Interpretation of Legislation Act 1984* of Victoria (Vic), s 54A and sch1 (see www.legislation.vic.gov.au); *Reprints Act 1992* of Queensland (Qld) (see www.legislation.qld.gov.au); *Reprints Act 1984* of Western Australia (WA) (see www.slp.wa.gov.au); *Legislation Revision and Publication Act 2002* of South Australia (SA) (see www.legislation.sa.gov.au); *Legislation Publication Act 1996* of Tasmania (Tas) (see www.thelaw.tas.gov.au); *Legislation Act 2001* of the Australian Capital Territory (ACT), pt 11.3 (see www.legislation.act.gov.au). The Commonwealth and the Northern Territory are the only Australian jurisdictions that do not have legislative editorial powers of some kind.

[3] For example, compare the much broader editorial powers under the *Reprints Act 1972* (repealed) of New South Wales with the existing powers in that State mentioned in note 2.

This paper is based particularly on my experience in the use of editorial powers in two Australian jurisdictions, Queensland and the Australian Capital Territory. These jurisdictions have used editorial powers extensively in the past, particularly in establishing their plain English drafting styles, reforming their statute books, building electronic databases of legislation, and moving to the electronic publishing of their legislation. Although the legislative editorial powers in Queensland and the Australian Capital Territory are broadly the same in scope, stylistically they are quite different. The Queensland Reprints Act is very detailed with many of the powers spelt out at some length and the powers illustrated by numerous examples. By contrast, the Australian Capital Territory Legislation Act uses fewer, more broadly expressed provisions and has few examples.

Over the last few years there have been interesting developments in at least two non–Australian common law jurisdictions: Hong Kong and New Zealand. Hong Kong has recently enacted its *Legislation Publication Ordinance*[4] after a searching inquiry by a Bills Committee of its Legislative Council.[5] In New Zealand, the Legislation Bill 2010 was introduced into the New Zealand Parliament on 25 June 2010 and has been considered by the Regulations Review Committee of the New Zealand Parliament,[6] but had not been passed when this paper was prepared for publication. These developments provide echoes of the Australian experience, but also raise new issues that go beyond Australian experience. I will also deal with the developments in Hong Kong and New Zealand in this paper.

What are editorial changes?

Meaning of editorial changes

Editorial changes are changes made to legislation in preparation for its publication by an official (usually the Parliamentary Counsel, the Secretary for Justice or an equivalent official with responsibility for the publication of legislation or its preparation for publication).[7]

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[4] *Legislation Publication Ordinance* (Cap 614) of Hong Kong (HK) (see www.legislation.gov.hk). At the time of writing this paper (July 2011), the Ordinance had not fully commenced when this paper was prepared for publication.

[5] Legislative Council of Hong Kong Paper No. CB(2)1999/10-11 (see www.legco.gov.hk).

[6] For the Bill, Parliamentary debates and the Regulations Review Committee's report, see www.parliament.nz. The Bill largely gives effect to the New Zealand Law Commission's report Presentation of New Zealand Statute Law, October 2008 (see www.lawcom.govt.nz) and will replace the existing *New Zealand Act* giving legislative editorial powers (the *Acts and Regulations Publication Act 1989*).

[7] NSW, s 45C and s 45D (the Parliamentary Counsel); Vic, s 54A (the Chief Parliamentary Counsel); Qld, s 4 (the Parliamentary Counsel); WA, s 7 (an authorised officer – see s 5(3), namely, the Parliamentary Counsel or a person employed in the Parliamentary Counsel's Office and authorised by the Attorney-General); SA, s 6 (the Commissioner for Legislation Revision and Publication – see s 4, namely, the Parliamentary Counsel, or legal practitioner employed in the Office of Parliamentary Counsel, as appointed by the Attorney-General); Tas, s 9 (the Chief Parliamentary Counsel); ACT, s 114 (the

Editorial changes are usually made during the preparation of amended legislation for publication. In Australia, these are variously called reprints, compilations or republications of the amended legislation. However, there is no reason why editorial changes cannot be made to unamended legislation if this is authorised or otherwise permitted.[8]

Authorisation to make editorial changes

Section 114 of the *Legislation Act 2001* of the Australian Capital Territory is an example of a legislative power authorising the making of editorial changes.[9] Section 114 provides as follows:

114 Authorisation for parliamentary counsel

In preparing a law for republication, the parliamentary counsel is authorised—

(a) to make editorial amendments and other textual amendments of a formal nature that the parliamentary counsel considers desirable to bring the law into line, or more closely into line, with current legislative drafting practice; and

(b) to make other editorial changes by way of format, layout or printing style, or in any other presentational respect, that the parliamentary counsel considers desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

Kinds of editorial changes: textual and non-textual changes

As can be seen from the Australian Capital Territory provision that I have just quoted, editorial changes to legislation are of two very different kinds: textual changes made under editorial powers (which to avoid confusion I will call editorial 'amendments' since they operate in the same way as amendments)[10] and non-textual (or 'presentation') changes.

In Australia, the practice in all jurisdictions, as far as I am aware, is that editorial amendments are not (and have never been) made without statutory authority.[11]

Parliamentary Counsel); HK, s 12 and s 17 (the Secretary for Justice); NZ, s 25 and s 26 (the Chief Parliamentary Counsel).

8 See, for example, ACT, s 107: "law means an Act or statutory instrument, whether or not it has been amended…". In Queensland and the Australian Capital Territory, reprints (or republications) are prepared for new Acts and regulations on their commencement and editorial powers are applied to them (but not to the 'as made' versions of the Acts and regulations).

9 ACT, s 116 sets out the ambit of the editorial amendments that may be made under s 114.

10 See especially Vic, s 54A(3) and (4); Qld, s 9 and s 49; Tas, s 11; ACT, s 117.

11 See note 2 for the powers under which editorial amendments are made in Australia. A possible exception is the making of minor editorial amendments, especially of punctuation and numbering, consequential on legislative amendments (see the examples of consequential amendments in ACT, s 116(1)). The practice in Australia in relation to minor amendments consequential on legislative amendments varies from jurisdiction to jurisdiction and would appear to have varied from time to time. Two jurisdictions have

Most, but not all, Australian jurisdictions also have some statutory authority for making non-textual editorial changes to legislation.[12] The Hong Kong *Legislation Publication Ordinance* and the New Zealand Legislation Bill also include powers to make non-textual amendments.[13] By contrast to the position with editorial amendments, some Australian jurisdictions make (or have made) non-textual editorial changes without authorising statutory authority. For example, the Commonwealth made significant changes to the format, layout and printing styles of Commonwealth legislation during the 1990's without statutory authority.[14]

Editorial amendments do not change the law

One general feature of editorial amendments is that they do not change the effect of the law. This is expressly provided in all Australian jurisdictions that have broad statutory editorial powers[15] and is provided in Hong Kong's *Legislation Publication Ordinance*[16] and the New Zealand Legislation Bill.[17] Although the wording of this important limitation on the power to make editorial amendments varies from jurisdiction to jurisdiction, the following example taken from the Hong Kong Ordinance illustrates the nature of the limitation:[18]

> **13 Editorial amendments to change legal effect of Ordinance**
>
> Section 12 does not permit any editorial amendments that would change the legal effect of any Ordinance.

Because the wording of this limitation can significantly affect editorial powers that would otherwise be properly and appropriately available, the wording needs to be chosen with care.[19]

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legislative provisions expressly authorising the making of editorial amendments consequential on legislative amendments: see Qld, s 5(d) and examples, and ACT, s 116(1)(o) and examples.

[12] See NSW, s 45E(1)(d); Vic, s 54A(1) and (2) (limited style change only); Qld, s 35; WA, s 7(5)(d) (limited to certain definition styles); SA, s 7 (1)(h)(ix); Tas, s 24; ACT, s 114 (b). There is no statutory authority for making non-textual editorial changes in the Commonwealth or the Northern Territory.

[13] See HK, s 12(h); NZ, s 26.

[14] The making of non-textual editorial changes to legislation would not seem to require legislative authority, particularly if the changes do not effect legislation in a respect relevant to its interpretation (for example, matters of printing style).

[15] See Qld, s 8; WA, s 7(2) and (5a); SA, s 7(2); Tas, s 10. But see WA, s 7(5b) which expressly permits the making of a 'clerk's amendment' (as defined in s 7(5c) "even if the amendment affects the operation or meaning of the Act."

[16] See HK, s 13. But note that this section does not apply to 'revisions' made under HK, s 17.

[17] See NZ, s 24(2).

[18] SA, s 7(2) and ACT, s 115 are similarly worded to HK, s 13.

[19] It should be noted that wording of HK, s 13 would not, for example, work for a power like the revision power in HK, s 17(c) to transfer a saving or transitional provision in an Ordinance to another Ordinance. It would seem that, depending on the editorial powers to be provided, the limitations in Qld, s 8; Tas, s 10

Editorial amendments made administratively and without Parliamentary oversight

In Australia, the practice has been that editorial amendments are made administratively and are not subject to any specific oversight by Parliament. By contrast, under the Hong Kong *Legislation Publication Ordinance* certain editorial amendments (which are called "revisions") can only be made by an order that is required to be made publicly available (by publication in the Gazette) and tabled in the Legislative Council. The order is subject to amendment by the Legislative Council in accordance with the procedures applying to subsidiary legislation and cannot come into operation before the end of the period during which the Legislative Council can amend it.[20] Similarly the New Zealand Legislation Bill requires certain editorial amendments relating to numbering and renumbering to be authorised by an instrument that, as I understand it, will be required to be made publicly available and subject to negative vetting by the New Zealand Parliament.[21]

Editorial amendment subject to negative vetting

For the purposes of this paper, I will treat editorial amendments that are subject to negative vetting by the legislature in the same way as any other editorial amendment, but I will draw attention, at appropriate places, to any differences applying to a power subject to negative vetting. However, it is important to note for the moment that the Hong Kong Ordinance expressly provides that an editorial amendment may not change the legal effect of any Ordinance, but does not include a similar provision for a revision. I assume, therefore, that in Hong Kong revisions, in principle at least, may operate more broadly than editorial amendments.[22] However, in most other respects revisions are similar to equivalent editorial amendments in Australian jurisdictions and those that are proposed for New Zealand.

What editorial changes do not include

Having said what editorial changes are, it might be helpful to say a little about what editorial changes do not include for the purposes of this paper.

First, editorial changes do not include legislative amendments or modifications made to legislation by or under the authority of the lawmaker that change the legal effect of the legislation.[23] Programs to review older legislation and prepare legislative amendments that

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and NZ, s 24 may need to be approached with care because they do not permit changes to the effect of a 'provision' of a law even if there is no overall change to the law.

[20] See HK, s 17 and s 18.

[21] See NZ, s 25(1)(b) and (2).

[22] However, the scope of the revisions power in HK, s 17 is carefully circumscribed and, having regard to the scope of the power, there would seem to be limited capacity to change the law through the exercise of the revisions power (but clear capacity to change the legal effect of individual provisions or Ordinances by relocating words or provisions).

[23] On one view, revisions made under HK, s 17 could be said to be legislative amendments of this kind. However, revisions will be treated for the purpose of this paper as editorial amendments.

were outside the scope of editorial powers, or were more appropriately made by legislative amendment rather than editorially, complemented the extensive use of editorial powers at different times in Queensland and the Australian Capital Territory. However, those legislative amendments, even if they made or confirmed amendments of an editorial nature, are not editorial changes for the purposes of this paper.

Second, editorial changes do not include changes made during the codification of legislation, or the preparation of revision Bills as is proposed under the New Zealand Legislation Bill.[24]

Finally, editorial changes do not include rectification changes.[25] Rectification changes are changes made to a published version of legislation (these days often contained in an electronic database) to correct errors arising because of discrepancies between the legislation as made or amended and the published versions of the legislation. Rectification simply corrects mistakes made in publishing legislation and restores the legislation to the form that it should be in. In the hard copy publishing of legislation, rectification changes are usually made by correction or corrigendum notices.

The statute book

Before turning to consider the advantages of editorial powers, I want to say something about the statute book and its ongoing maintenance and reform.

The statute book of a jurisdiction is all of its legislation, and all of the provisions of its legislation, taken as a body of law. The statute book in a common law country is typically created by a complex mosaic of individual items of legislation (both Acts and subordinate legislation) and their provisions. Individual items of legislation interact with other items of legislation. Individual provisions interact with other provisions: both within a particular item of legislation and across the statute book. No item of legislation or provision can be considered in isolation, but has to be considered against the totality of the statute book of which it forms part.

The statute book of a jurisdiction is not static, but is constantly changing as new laws are made and existing laws are amended and repealed. These changes may themselves require further changes to the statute book through consequential amendments or repeals to ensure that the statute book remains a harmonious whole. Making all necessary consequential amendments and repeals can be especially hard to achieve for a jurisdiction without a comprehensive database of its statute book. In addition, even with the highest level of care,

[24] See NZ, pt 2, subpt 3. Australian jurisdictions do not use codification or revision Bill processes. The proposed New Zealand revision Bill process provides another approach to updating the statute book. The proposed power in the New Zealand Bill (see s 15) to revoke spent instruments provides an interesting mechanism to deal with the clutter caused by instruments that have ceased to have effect or are no longer required.

[25] See *Acts Publication Act 1905* (Cwlth), s 8 and *Legislative Instruments Act 2003* (Cwlth), s 23. For Commonwealth legislation, see www.comlaw.gov.au.

mistakes happen in making amendments and repeals and these need to be corrected. Constant ongoing maintenance is, therefore, needed to ensure that the statute book remains consistent and coherent despite the changes made to it.

A statute book that is well maintained significantly enhances access to legislation by making relevant items of legislation and provisions easier to find, read and understand. It also facilitates the drafting of new legislation and the publication of new and existing legislation. Without the high level of consistency that comes from a well maintained statute book, it can be difficult (and substantially more expensive) to automate drafting and publication processes, to develop an electronic database of the statute book, or to move from hard copy to electronic publishing of legislation.

At times ongoing maintenance of a jurisdiction's statute book is not sufficient to ensure consistency and coherence. A jurisdiction's statute book is typically created over time. Over this time drafting practices, language usage, spelling, societal values, and printing formats and styles are likely to have changed markedly. In addition, the statute book is likely to have been created from a variety of sources (including, for example, Imperial and colonial legislation). Unless there has been sustained ongoing maintenance of the statute book, matters may reach a point where more radical reform of the statute book is needed.

Advantages of editorial powers

Purposes for which editorial powers can be used

Editorial powers can be used for two main purposes.

First, they can be used for ongoing maintenance of the statute book. For example, they can be used to correct minor errors arising out of amendments or to make minor amendments of numbering and punctuation consequential on legislative amendments and repeals.

Second, editorial powers can be used as a powerful mechanism of change. For example, they can be used to raise the standard of the statute book by implementing improved drafting standards across the statute book or ensuring a level of consistency throughout the statute book to facilitate the automation of drafting and publication processes, to develop an electronic database of the statute book, or to enable the electronic publication of legislation.

Overall Australian experience

My experience in Australia is that editorial powers can be highly useful for ongoing maintenance of the statute book. For a jurisdiction with limited resources or substantial legacy problems with its statute book, editorial powers can be an invaluable, if not indispensable, mechanism for change. Most Australian jurisdictions have been in this position at different times in the past and have used editorial powers extensively.

Main advantages of editorial powers: efficiency and flexibly

There are two main advantages in making minor or formal changes editorially rather than legislatively.

First, editorial powers can be more efficient than legislative amendments because they can allow numerous, minor changes to be made to legislation administratively. This can conserve drafting,[26] client and parliamentary resources. However, efficiencies can be partly offset by the safeguards to which the exercise of the editorial powers is subject. For example, more drafting resources are needed for revisions under section 17 of the Hong Kong *Legislation Publication Ordinance* than to make editorial amendments under section 12 of that Ordinance.[27] However, this in turn is partly offset by the records required to be made for editorial amendments.[28]

Second, editorial powers are particularly flexible. Editorial powers enable editorial amendments to be made to any part of the statute book or across the statute book without the need to rely on a legislative vehicle. They can also be made as and when needed or when resources permit.[29] Editorial amendments can, in particular, be made in accordance with publication cycles rather than being reliant on the legislative cycle. These factors mean that editorial amendments can be particularly useful to effect large scale change throughout the statute book (for example, to update spelling, to give effect to changes of drafting format and styles, or to support the use of Acts of general application by removing redundant provisions from the statute book).[30]

Are editorial powers needed at all?

Any changes that could be made by editorial amendment could, of course, be made by legislative amendment. If drafting, client and parliamentary resources were limitless and

[26] Editorial changes (especially non-textual changes) can be prepared or supported by non-drafting staff using automated processes (for example, customised word search macros). One benefit of this can be the raised skills that non-drafting staff acquire in reading and understanding legislation. These skills are invaluable in publishing legislation and can be used to improve support for drafting processes.

[27] Revisions are made by the Secretary for Justice by order published in the Gazette and are subject to scrutiny and amendment by the Legislative Council: see HK, s 17 and s 18. By contrast, editorial amendments are made administratively by the Secretary for Justice and are not subject to scrutiny by the Legislative Council: see HK, s 12.

[28] See HK, s 15 and s 16. See also HK, s 4(1)(e).

[29] Editorial amendments subject to negative or positive vetting may not have this full degree of flexibility. For example, revisions under the Hong Kong Legislation Publication Ordinance cannot come into operation until the scrutiny period has ended: see HK, s 18.

[30] Acts of general application are Acts like the interpretation legislation of a jurisdiction that operate across the statute book (or parts of the statute book) and help to ensure its consistency and coherence. They can help to reduce complexity and detail by providing standard provisions that have general or wide application.

there was always the time and client support, it would be possible for a jurisdiction to have and maintain a statute book of the highest standard without editorial powers. However, in at least some jurisdictions the drafting, client or parliamentary resources may not always be available to make the changes needed for ongoing maintenance of the statute book, the changes may not have sufficient priority to have the resources (for example, drafting resources) needed allocated to them, or there may simply not be sufficient time for all tasks (for example, necessary consequential amendments) to be completed properly. For jurisdictions without a well maintained statute book, particularly those without an electronic database of the statute book, ongoing maintenance of the statute book alone can be a difficult task even if the necessary resources are available. For those jurisdictions, dealing with legacy problems in the statute book, or making substantial reforms to its statute book, can be an overwhelming task without the use of editorial powers.

Advantages v. limitations

To conclude this section of the paper and attempt to put the advantages of editorial powers into some perspective, I might end with a statement that I noticed in the explanatory memorandum for the Legislation (Republication) Bill 1996 of the Australian Capital Territory. Under the heading 'Financial implications', there is the following statement:

> The Legislation (Republication) Bill 1996 will generally obviate the necessity for the preparation and printing of Statute Law Revision Bills together with the accompanying abundance of papers. There is no negative budget impact.[31]

As a cursory examination of the Acts enacted in the Australian Capital Territory since 1996 will disclose,[32] experience has not borne out this prediction. Although editorial powers have their advantages, they also have important limitations that need to be kept in mind in assessing the advantages.[33] These limitations mean that editorial powers can be a valuable part of a strategy to maintain or reform the statute book, but cannot be the sole strategy.

[31] See www.legislation.act.gov.au.

[32] See generally www.legislation.act.gov.au.

[33] 1 In Australia Statute Law Revision Bills (which have various names) are typically used to make minor, technical amendments or to repeal redundant legislation. The extent to which they may also include minor policy changes varies. Some, but not all, of the amendments made by Statute Law Revision Bills could be made under editorial powers (or are of an editorial nature). Unlike editorial amendments, amendments made by Statute Law Revision Bills can and do change the effect of the law (at least in some cases) or put the law beyond doubt.

Limitations on use of editorial powers

Typical features of editorial powers

In considering editorial powers, it is important to keep in mind some of the typical features of a power to make editorial amendments to legislation.[34] First, it is a power to change the text of the law itself. Second, it is a power to change the text of the law in the form in which it was enacted by the lawmaker.[35] In the case of Acts, this is the legislature. Third, it is a power given by the legislature to an official. Fourth, it is a power that is to be exercised administratively, and is not a power to change the legal effect of the law.[36] Fifth, editorial powers are given for limited purposes[37] and are carefully limited in their scope. They are not general powers to revise or re-enact the law.[38] These features suggest some important limitations on the use of powers to make editorial amendments.

Limitation 1: Editorial powers need to be exercised in a careful, measured way

First, editorial powers need to be exercised in a careful, measured way that inspires confidence in the application of powers to make editorial amendments. A drafting office exercising powers to make editorial amendments needs to have, and follow, quality assurance control processes similar to those applying to the drafting of legislation. In my view, those processes need to include, and be seen to include, checking or personal supervision by a senior, experienced drafter, preferably (at least initially) by the head (or a retired head) of the office. The risk of error needs to be minimised as much as possible. Any errors that are detected need to be corrected promptly and acknowledged as errors. It is important that mistakes be not seen as an uncovered attempt to exercise editorial powers inappropriately. Such a perception undermines confidence.

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[34] These features do not apply to non-textual editorial amendments. Accordingly, it would not be appropriate to apply the limitations discussed in this section of the paper directly to them. However, information about non-textual editorial changes is required (or proposed to be required) in some jurisdictions: see Qld, s 7(2) (see also s 7(1)(f)); HK, s 15 and s 16 (see also s 12 (h)); NZ, s 27 (see also s 26).

[35] Or later changed by editorial amendment if the law has been previously amended by editorial amendment.

[36] See page 4. This feature does not apply to revisions under HK, s 17. The power to make revisions would seem to be a legislative power and is not expressed to be subject to the restriction that the power does not permit any revision that would change the legal effect of any Ordinance (compare HK, s 12).

[37] The purposes may, however, be broadly expressed. See, for example, Qld s 2(1): 'The object of this Act is to facilitate the updating and ready availability of Queensland legislation.'. See also NZ, s 3(d).

[38] Compare the purpose of revision Bills as stated in NZ, s 29(2): 'The purpose of revision is to re-enact, in an up-to-date and accessible form, the law previously contained in all or part of 1 or more Acts, but (except as authorised by this subpart) revision is not intended to change the effect of a law.'. The revision powers provided in HK, s 17 would generally not seem to have such a broad scope. Most of the powers are specific and limited. But see the apparently broad power in HK, s 17(a) to 'make an alteration to an Ordinance for the purpose of securing uniformity of expression within an Ordinance or with another Ordinance'.

Limitation 2: Impact on users of legislation needs to be considered in exercising editorial powers

Second, consideration needs to be given to the impact that the exercise of editorial powers may have on the users of legislation and the application of editorial powers adjusted in the light of this potential impact. The exercise of editorial powers may have a substantial overall long-term benefit. However, this needs to be balanced against the short-term disruption to users and strategies implemented to manage and minimise this disruption. Although there needs to be a coherent strategy for the exercise of editorial powers, it is important that editorial powers be applied with some degree of flexibility and not rigidity. This flexibility needs to extend both to the types of editorial powers that are applied and the particular items of legislation to which editorial powers are applied.

Some editorial powers, by their nature, have a high impact on users of legislation because of their disruptive effect on aspects of the text of legislation with which users are familiar. Renumbering of provisions (particularly at or above the section level) is the most obvious example. Another example is the updating of non-standard language.[39] Editorial powers of this kind need to be used selectively and, for some legislation, not all. There are strategies that can be used to minimise the impact of such powers on users (for example, detailed information on the exercise of renumbering powers).[40] However, it should always be a matter of judgement in relation to each item of legislation whether some of the more disruptive editorial powers should be used at all.

Some items of legislation are particularly sensitive or have a high level of detailed use and understanding by users (particularly lawyers). For example, legislation that has been the subject of numerous court decisions, or deals with sensitive rights of the subject against the State, needs to be approached with particular care. Again, for legislation of this kind it needs to be a matter of judgement whether editorial powers should be exercised at all and, if so, to what extent.

In conclusion, on this point, I should put the matter into some perspective. The application of many editorial powers (for example, the making of minor, standard editorial amendments consequential on legislative amendments) is not disruptive to users of legislation and the overall benefit clearly outweighs any impact on users. In addition, much of the statute book is not particularly sensitive and does not have an especially high level of detailed use and understanding by users. There is, therefore, significant scope for the exercise of editorial powers even after careful consideration has been given to the impact of their use on users of legislation.

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[39] The updating of language can also be seen as the discretionary exercise of a value judgement. The application of editorial powers in such cases can undermine confidence in the exercise of the powers.

[40] Another strategy used in some Australian jurisdictions (particularly the Australian Capital Territory) is to renumber at or above section level only with specific legislative authority. Renumbering is routinely done in the Australian Capital Territory below section level under editorial powers without specific legislative authority.

Limitation 3: Editorial powers cannot be used to change the effect of the law

Third, as I already mentioned,[41] one general feature of editorial amendments is that they do not change the effect of the law. Having regard to the nature of editorial powers, my view is that this is an important limitation that needs to be maintained.[42] There are several consequences of this limitation. First, an editorial amendment should only be made if there is clear legislative authority to make the amendment and, if the amendment were to be made, this would clearly not change the effect of the law.[43] Although an editorial amendment that was beyond power or purported to change the law would be invalid, it is important that there be no doubt about the text of a law.[44] Second, it is even more important that an editorial amendment should not be made in a misguided attempt to resolve an ambiguity in the law.[45] If there is an ambiguity in a law, this needs to be resolved by a legislative amendment and not by a purported editorial amendment.

Limitation 4: Editorial powers cannot be used to rewrite legislation

Fourth, in exercising editorial powers the distinction between reprinting and re-enacting the law needs to be kept in mind.[46] The power to make editorial amendments is a power to make editorial amendments of specified, limited kinds. It is not a general power to revise or rewrite legislation.[47] Revision and rewriting needs to be achieved by other processes and not by a power to make editorial amendments. It follows that editorial amendments may be numerous (if this is authorised), but they need to be of a minor, discrete nature.

Limitation 5: Editorial powers need to be exercised transparently

Finally, the power to make editorial amendments needs to be exercised in a transparent way and users of legislation need to be able to find out whether editorial amendments have been

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[41] See page 4.

[42] But see pages 4-5 for revisions made under HK, s 17.

[43] In New Zealand, this point was stressed in the report of the Regulations Review Committee on the Legislation Bill (see page 5 of the report). The committee recommended an amendment to make the point clear.

[44] Even if there is no doubt that an editorial amendment would not change the effect of the law, it would sometimes be prudent (particularly in sensitive cases) to put the point beyond doubt by a confirming legislative amendment.

[45] This point was raised by the Honourable David Parker in the New Zealand Parliament in the first reading debate on the Legislation Bill.

[46] This point also raised in the report of the Regulations Review Committee on the New Zealand Legislation Bill (see also page 5 of the report).

[47] Some editorial powers authorise the making of amendments consequential on editorial amendments: see Qld, s 7(1)(k); SA, s 7(1)(b) (heading alterations only); Tas, s 27(2)(b) (consequential numbering only); ACT, s 116(1)(p); HK, s 12(i) and s 17(k); NZ, s 25(1)(m) and (2)(c). However, a power to make consequential amendments could not support the revising or rewriting of laws generally.

made, what they are and when they were made. Some, but not all, of the jurisdictions that have editorial amendment powers require information to be made available about the exercise of the powers.[48]

The most onerous of those requirements would seem to be under the Hong Kong *Legislation Publication Ordinance.* Section 15(1) provides as follows:

> (1) The Secretary for Justice must compile a record containing—
>
> > (a) descriptions of editorial amendments made;
> >
> > (b) the time and date on which each description of editorial amendments is entered in the record; and
> >
> > (c) other information that the Secretary for Justice considers useful to users of the record.

Under the Ordinance an editorial amendment does not have effect unless the information relating to the amendment has been compiled under section 15(1)(a) and (b).[49] The Ordinance also requires the record of editorial amendments compiled under section 15 to be included in the electronic database established and maintained under the Ordinance.[50]

The *Queensland Reprints Act* takes a similar, but perhaps not as onerous an approach. That Act requires that, if editorial powers are used in a reprint as permitted under that Act, 'the reprint—

> (a) must indicate that fact in a suitable place; and
>
> (b) must outline in general terms, and in a suitable place, the way in which the permission was used.'.[51]

For a reprint that has been amended under the *Reprints Act*, Queensland practice is to include information on the inside front cover of the reprint indicating that it has been amended under that Act and listing the kind of amendments made in that reprint and the provisions of the Act under which they were made (for example, 'use different spelling consistent with current drafting practice (s 26(2))').

By contrast, section 118 of the Australian Capital Territory *Legislation Act* simply requires that, if editorial amendments are made to a law in preparing an authorised republication of the law, "the republication must indicate that fact in a suitable place". The practice in the Australian Capital Territory is to include this indication on the inside front cover of

[48] See Qld, s 7(2); ACT, s 118; HK, s 15 and s 16 (and see also, s 4(1)(e)); NZ, s 27. Revisions under HK, s 17 are made by an order that is published in the Gazette. Information could, of course, be made available administratively without a statutory requirement to provide it.

[49] See HK, s 16.

[50] See HK, s 4(1)(e).

[51] See Qld, s 7(2). NZ, s 27 requires identical information in a reprint if editorial changes are made in the reprint.

republications and to make information about the exercise of editorial powers available on request.

Another aspect of transparency in the making of editorial amendments is that it should be possible for a user of legislation to see the original legislation as made, to trace the effect of successive amendments of the legislation through the various versions of the legislation, and to be able to say with complete certainty what changes were made by legislative amendment, what law made the changes and when they were made.[52] The changes that were not made by legislative amendment may have been made editorially or they may simply be mistakes made in republishing the legislation. For this reason, my view is that editorial amendments should not be made to the version of the original law, or to the version of any amending law, as made by the lawmaker (an "as made" version), but only to separately compiled or republished versions of the original law or the law as amended from time to time.[53] The "as made" versions are then available for a user to see the exact form in which the law was made and amended by the lawmaker.

Conclusions

Amendments made under editorial powers have significant practical advantages over legislative amendments, particularly their efficiency and flexibility. However, editorial powers do have significant limitations. In particular, they cannot (and should not) be used to change the effect of the law and cannot be used to rewrite legislation. Therefore, editorial powers cannot be used to solve all the problems of the statute book. Nevertheless, editorial powers can provide an invaluable part of a broader strategy to both maintain and improve the standard of a statute book.

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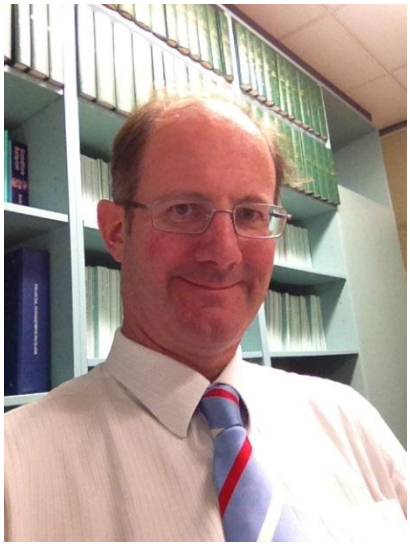
[52] Notes at the legislation and provision level are a valuable aid in this task.

[53] See page 2 about the making of editorial changes to unamended legislation.

Legislative titles - What's in a name?

Paul O'Brien[1]



Abstract:

Legislative titles provide a fascinating insight into the psyche of a legislative jurisdiction. This article explores that theme by comparing the titles of legislation from a number of jurisdictions, principally Hong Kong, Canada and Victoria/Australia. It examines the different types of legislative titles, their functions and language. It also looks at the growing trend in some jurisdictions to politicize legislative titles. Comment is made on the helpfulness or otherwise of legislative titles to the reader of legislation.

Introduction

We all have preconceptions about the stereotype of different countries and places. What fascinates me is that my preconceptions are reflected in the titles given to legislation. Let's take 3 examples, Hong Kong, Canada and Australia. To illustrate the point, I'll use the titles of each jurisdiction's legislation concerning unsolicited electronic messages, commonly known as spam emails.

First, Hong Kong. My stereotype of Hong Kong is of a conservative and traditional place, based on its Chinese and British heritage. Very proper and correct, to the point of punctiliousness. The short title of the relevant Hong Kong legislation: *Unsolicited Electronic Messages Ordinance*.[2]

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[2] Cap 593 (HK).

Secondly, Canada. My stereotype of Canada is of a quirky place. A little bit American (baseball) and a little bit British (the Queen). But Canadians are on a mission to assert their own place in the world, and are also great story-tellers. The short title of the relevant Canadian legislation: *Fighting Internet and Wireless Spam Act*.[3]

Finally, Australia, a sunburnt country, of droughts and flooding rains. People are direct and laconic, tending to do things rather than talk about them. And when they do talk, monosyllables are the norm. The short title of the relevant Australian legislation: *Spam Act*.[4]

Lest it be thought that it is only the short titles that reflect these stereotypes, here are the long titles of the same statutes, which reveal a similar pattern:

> *Hong Kong*: An Ordinance to provide for the regulation of the sending of unsolicited electronic messages and for connected purposes.
>
> *Canada*: An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Act, the Competition Act, the Personal Information Protection Act and the Telecommunications Act.
>
> *Australia*: An Act about spam, and for related purposes.

Long titles

The norm is for Acts and Ordinances to have 2 titles, a long title and a short title. The long title could be considered the official title of the legislation. Its primary function is to set out the purpose of the legislation in general terms. This is particularly relevant for parliamentary purposes, when the Bill for the Act or Ordinance is being debated. Typically, the rules of procedure or standing orders of the legislature require a Bill to have a long title, and also provide that any amendments moved to a Bill must be relevant to the subject matter of the Bill[5]. The long title is one of the factors which is taken into account in determining whether a proposed amendment is relevant to the subject matter of a Bill.

There is some debate as to the appropriate length and content of a long title. This is particularly relevant to amending legislation. Is it sufficient to refer in the long title to the Principal Act that is being amended, or should the long title contain a description of the subject matter of the amendments? Here are examples of the different approaches:

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[3] Bill C-28 in the 40th Parliament, 3d session (Can). However, the bill was enacted without a short title: SC 2010, c. 23.

[4] Act no. 129 of 2003 (Cth).

[5] For example, rule 50(3) of the Rules of Procedure of the Legislative Council of Hong Kong states "The bill shall be given a long title setting out the purposes of the bill in general terms." Rule 57(4)(a) states "An amendment must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates."

Hong Kong: A Bill to amend the Buildings Ordinance to provide for matters relating to the regular inspection of buildings and the associated repairs to prevent buildings from becoming unsafe, and to make related, consequential and other minor amendments .[6]

Canada: An Act to amend the Electricity and Gas Inspection Act and the Weights and Measures Act[7]

Australia: A Bill for an Act to amend the Building Act 1983 and for other purposes (Victoria, Australia)[8]

The differences in approach to a large extent reflect differences in the legislative environment in each jurisdiction. For example, in Victoria, clause 1 of every Bill is a purpose clause setting out in detail the purpose of the Bill. That reduces the need for a detailed descriptive long title for parliamentary purposes. Also in Victoria, the long title of a Bill does not form part of the Act when enacted (although it is included in an endnote to the Act for reference purposes). So the long title, while still necessary under parliamentary standing orders, is not so important in terms of the enacted Act.

In Hong Kong, by contrast, long titles tend to contain a very detailed description of the purpose of the legislation. One reason for this is that only rarely do Hong Kong Bills contain purpose clauses. Another reason arises from the legislative system in Hong Kong, where the executive government is completely separate from the legislature. The more detailed and specific the long title of a Bill, the less scope for members of the legislature to move amendments to government legislation[9].

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[6] Buildings (Amendment) Bill 2010, enacted as Ord. no. 16 of 2010 (HK).

[7] SC 2011, c. 3 (Can).

[8] Building Amendment Bill 2011, enacted as Act no. 5 of 2011 (Vic).

[9] Sometimes this is taken to great lengths, for example: A Bill to amend the Air Pollution Control Ordinance to--

(a) regulate the emission of sulphur dioxide, nitrogen oxides and respirable suspended particulates as a result of the conduct of certain electricity works by measures including--

(i) the allocation to specified licence holders of the entitlement to emit those particulates from premises used for the conduct of such electricity works;

(ii) the imposition of relevant terms and conditions on the specified licences;

(iii) the specification of the manner in which such terms and conditions be complied with;

(b) remove the right of referring for review under section 35 of the Ordinance a decision of any Appeal Board constituted under Part VI of the Ordinance;

(c) prohibit a public officer from being appointed as or to act as Chairman of any Appeal Board constituted under Part VI of the Ordinance, or from being appointed as a member of a panel of persons eligible for appointment as members of any such Appeal Board;

(d) clarify the meaning of "licence" in the Ordinance and its subsidiary legislation;

(e) provide for incidental matters.

Air Pollution Control (Amendment) Bill 2008, enacted as Ord. no. 31 of 2008 (HK).

Short titles

The second title of legislation is usually called the short title. This could be considered the unofficial title, or the title by which the legislation may be cited. Commonly it is found in the first section of an Act or Ordinance:

1. Short title

This Act may be cited as the Immigration (Education) Amendment Act 2010.[10]

The short title is meant to be a very short description of the Act or Ordinance, which is used to refer to the legislation and to locate it in the statute book. Invariably an Act or Ordinance will be referred to by its short title rather than its long title, which means that the form and language of the short title is especially important.

In Victoria, short titles as such were dispensed with in the mid-1980s. Since then, all Acts have a title appearing before the enacting words, which is the equivalent of the short title.[11] As already mentioned, the long title in Victoria does not form part of the Act.

Form of short title - helping to locate the legislation

One of the main purposes of the short title is to locate the legislation in the statute book. While the advent of computers and advanced search engines has assisted in this regard, it is still important for the short title to be in a form that will help to locate the legislation. To take an example, when Australia introduced a goods and services tax, the short title of the main legislation was *A New Tax System (Goods and Services Tax) Act 2000*.[12] I would argue that this is not the most helpful title for locating the legislation. I would not think of looking under "A" to locate legislation about a tax, let alone a goods and services tax.

To take another example: Hong Kong has a number of Ordinances dealing with fixed penalties for various infringements such as parking and traffic offences, smoking offences and the like (paying the fixed penalty being a way of expiating the offence without any court proceedings or conviction). The short titles for these Ordinances were: *Fixed Penalty (Traffic Contraventions) Ordinance*, *Fixed Penalty (Smoking Offences) Ordinance*.[13] I drafted an Ordinance to impose a fixed penalty for idling a motor vehicle engine while parked. The short title I chose was *Motor Vehicle Idling (Fixed Penalty) Ordinance*.[14] I chose this on the basis that it would be easier to locate the Ordinance with such a title, as the main subject matter of the Ordinance was motor vehicle idling and its prohibition, the imposition of a fixed penalty only being a means of enforcement.

[10] Act no. 112 of 2010 (Cth). In some jurisdictions the short title is combined with the commencement provision. That is the current practice in Hong Kong, and was the practice in Victoria before that jurisdiction dispensed with short titles.

[11] This is mandated by section 10 of the Interpretation of Legislation Act 1984 (Victoria).

[12] Act no. 55 of 1999 (Cth).

[13] Caps 237 & 600 (HK).

[14] Cap 611 (HK).

Language of short title - descriptive

For a short title to be accurate and helpful, you would assume that it should be descriptive of the subject matter of the legislation. Quite often this takes the form of a single word description:

- *Immigration Ordinance*
- *Crimes Act*
- *Evidence Act*
- *Copyright Act.*

The short title is generally also descriptive of whether legislation is principal legislation or amending legislation. Jurisdictions generally adopt naming conventions to indicate whether legislation is amending legislation. For example, in Victoria, amending Acts include the word "Amendment" in the title, preceded by the title of the Principal Act being amended and sometimes followed in parentheses by a short description of the subject matter of the amendment:

- *Building Amendment Act 2011*[15]

  (amending the Building Act 1993)

- *Constitution Amendment (Judicial Pensions) Act 2008*[16]

  (amending the *Constitution Act 1975* regarding judicial pensions).

In Hong Kong the convention is a little different: the word "Amendment" is included in parentheses following the name of the Principal Ordinance, with sometimes a short description of the subject matter of the amendment interposed, also in parentheses:

- *Companies (Amendment) Ordinance 2010*[17]

  (amending the Companies Ordinance)

- *General Holidays and Employment Legislation (Substitution of Holidays) (Amendment) Ordinance 2011*[18]

  (amending the *General Holidays Ordinance* and the *Employment Ordinance* to allow for substitution of particular holidays falling on a Sunday).

[15] Act no. 5 of 2011 (Vic).

[16] Act no. 23 of 2008 (Vic).

[17] Ord no. 12 of 2010 (HK).

[18] Ord no. 23 of 2011 (HK).

Language of short title - reflecting the culture and times

Short titles of legislation reflect the culture of the jurisdiction. For example, given Hong Kong's history and culture, it is not surprising that prominent short titles include:

- *Bills of Exchange Ordinance*
- *Factors Ordinance*
- *Stowaways Ordinance*
- *Chinese Temples Ordinance.*[19]

The language of short titles also reflects the age of the legislation and the way language changes over time. For example, compare these 2 United Kingdom Acts dealing with the same subject matter over a century apart:

- *Lunacy Regulation (Ireland) Act 1871*[20]
- *Mental Health Act 2007*[21]

Or these 2 Victorian Acts:

- *Inebriates Act 1890*[22]
- *Alcoholics and Drug-dependent Persons Act 1968.*[23]

Sometimes the language changes over a much shorter period of time. In Victoria, the *Prostitution Control Act* (enacted in 1994) was retitled as the *Sex Work Act* in 2010.[24]

Language of short title - standard of language

Should the language of a short title adhere to the same standard that applies to the text of the legislation? Or is it acceptable for a lesser standard of language in a short title, to encompass for example, colloquial or slang terms that may be more familiar to the public than more legal or esoteric terms?

Victoria introduced the use of slang in a title in 2009. In 2005, the *Road Safety Act 1986* was amended, in an Act entitled *Road Safety and Other Acts Amendment (Vehicle Impoundment and Other Amendments) Act 2005*,[25] to provide for the police to impound motor vehicles in

[19] Respectively, Caps 19, 48, 83 & 153 (HK).

[20] 1871 c.22 (UK).

[21] 2007, c. 12 (UK).

[22] Act no. 1101 (Vic).

[23] Act no. 7772 (Vic).

[24] Section 42(1) of the *Consumer Affairs Legislation Amendment Act 2010*, Act no. 1 of 2010 (Vic).

[25] Act no. 93 of 2005 (Vic).

the case of what is colloquially known as "hoon driving".[26] Although formally titled, this amending Act was known as the "hoon legislation". In 2009, when a similar scheme was introduced in relation to water craft, the title of the amending Act was *Transport Legislation Amendment (Hoon Boating and Other Amendments) Act 2009*.[27] So the slang word "hoon" was elevated into a legislative title. While purists may be dismayed, at least this brings the title of the law into line with what it is known as by the general public, so maybe that is not altogether a bad thing.

Another example of the use of slang was a Bill introduced into the Australian Parliament by an opposition member under the short title of *A Better Future for Our Kids Bill 2003*.[28] The purpose of the Bill (as stated in the long title) was to establish an Office of National Commissioner for Children and Young People, although a language purist might be forgiven for thinking that the Bill was about providing a better future for young goats.

Language of short title - political slogans

The most controversial issue with the language of short titles is whether or not they should encapsulate political slogans. It is understandable that governments and politicians, who are the promoters of legislation, will be keen to promote their slogans by including them in the titles of their legislation. This often causes tension with the drafters, who may prefer a more neutral title that is more descriptive of the subject matter of the legislation.

The rise of the use of slogans in legislative titles is a recent phenomenon, being co-incident in time, although not necessarily as a consequence of, the rise of the plain language movement.

In the 1990s in Victoria, a number of Acts were rewritten and re-enacted by a new government that had a "reform" agenda. So we saw the following titles:

- *Transport (Tow Truck Reform) Act 1995*
- *Shop Trading Reform Act 1996Retail Tenancies Reform Act 1998*
- *Liquor Control Reform Act 1998.*[29]

A similar situation occurred more recently in New Zealand after the election of a new government:

- *Alcohol Reform Bill 2010*
- *Biosecurity Law Reform Bill 2010*

[26] **Hoon**: (a) an exhibitionist, an idiot who enjoys showing off; (b) a show-off who drives a car recklessly or at dangerous speed (*Australian Concise Oxford Dictionary*, 4th Ed. 2008)

[27] Act no.93 of 2009 (Vic).

[28] Introduced HR 26/5/2003 (C2004B01419). Not enacted.

[29] Respectively, Act nos 17 of 1995, 38 of 1996, 14 of 1998 & 94 of 1998 (Vic).

- *Criminal Procedure (Reform and Modernization) Bill 2010.*[30]

Apart from the Victorian examples above, slogans have not often been used in short titles in Australian jurisdictions other than the federal jurisdiction. Apart from the previously mentioned examples of *A New Tax System (Goods and Services Tax) Act 1999* (a government Act) and *A Better Future for Our Kids Bill 2003* (a private member's Bill),[31] this is perhaps best exemplified by the changing political slogans associated with (and included in the short titles of) legislation relating to industrial relations. In 2005, the Australian government introduced the *Workplace Relations Amendment (Work Choices) Act 2005*,[32] "Work Choices" being the slogan for the industrial relations changes the government had foreshadowed in the preceding election campaign. Following the next election, a new Australian government introduced the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*,[33] again reflecting a campaign slogan. This in turn was replaced by the *Fair Work Act 2009*.[34]

Canada has recently turned the use of political slogans in legislative titles into an art form. In the Canadian federal jurisdiction, most recent amending Acts have a short title that consists of or includes a slogan. Thus, from 2009 to 2011, we have seen the following:

- *Keeping Canadians Safe (International Transfer of Offenders) Act*[35]
- *Increasing Voter Participation Act*[36]
- *Fairness at the Pumps Act*[37]
- *Serious Time for the Most Serious Crime Act*[38]
- *Cracking Down on Crooked Consultants Act.*[39]

One problem with using a slogan as the short title of an amending Act is that it gives no indication that it is an amending Act, let alone of the Principal Act that is being amended, thus making the amendments more difficult to identify. Only someone with detailed knowledge of the circumstances would know that the *Cracking Down on Crooked Consultants Act* was an amendment to the *Immigration and Refugee Protection Act*. The amending Act, which sets up a system for regulating immigration consultants, was enacted

[30] Respectively Bills 236-2, 256-3 & 243-2, 49th Parliament (NZ).

[31] Act no. 55 of 1999 (Cth) and HR 26/5/2003 (C2004B01419) (not enacted).

[32] Act no, 153 of 2005 (Cth).

[33] Act no. 8 of 2008 (Cth).

[34] Act no. 28 of 2009 (Cth).

[35] Bill C-5, 40th Parliament, 3rd session (Can).

[36] Bill C-18 40th Parliament, 3rd session (Can).

[37] SC 2011, c. 3 (Can).

[38] Bill C-36, 40th Parliament, 2nd session (Can).

[39] Bill C-35, 40th Parliament, 3rd session, enacted without a short title as SC 2011, c. 8 (Can).

in response to instances of exploitation by some consultants. While the Canadian public (or at least the relevant sector of the Canadian public) may have been aware of the circumstances leading to the legislation at the time, anyone unfamiliar with those circumstances would be hard pressed to identify the Principal Act being amended. And the public tends to forget, so in the future they will struggle to remember the connection between the short title and the actual subject matter of the amendments.

It is not only the Canadian federal jurisdiction that has caught the bug (so to speak). Here are some short titles from the province of Ontario:

- *Fairness is a Two-Way Street Act (Construction Labour Mobility) 1999*[40]
- *Excellent Care for All Act, 2010*[41]
- *Open for Business Act, 2010.*[42]

It takes some stretch of the imagination to discern that the *Open for Business Act, 2010* was an amending Act authorising a statutory authority to provide agricultural insurance and amending provisions for drainage works.

Turning back to the Canadian federal jurisdiction, which enacts its legislation bilingually, it seems that the use of slogans is restricted to the short title of the English version of the law. Take, for example, the *Serious Time for the Most Serious Crime Act*.[43] The equivalent title in the French version of the Act is *Loi renforçant la sévérité des peines d'emprisonnement pour les crimes les plus graves*, which translates more or less as the "Strengthening the Severity of Sentences for the Most Serious Crimes Act". That sounds a lot less like a slogan than the English.[44]

This last example illustrates another recent phenomenon in Canada. The long title for the Act was "*An Act to amend the Criminal Code*". At 7 words, the long title is shorter than the 8 word short title. To avoid this anomaly, the short title for this Act is called "Alternative title". A more vivid example of this is another Canadian Act to amend the *Criminal Code*, which has the same 7 word long title as that quoted above, but an alternative title that stretches to 15 words.[45] So much for the short title being a handy reference to the Act!

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[40] SO 1999, c. 4 (ON).

[41] SO 2010, c. 14 (ON).

[42] SO 2010, c. 16 (ON).

[43] Bill C-36, 40th Parliament, 2nd session (Can).

[44] Although politicization may be catching up with the French version as well: the French short title of the Cracking Down on Crooked Consultants Act (see above, n. 39) was Loi sévissant contre les consultants véreux. My French dictionary gives the following translations for "véreux": shady, corrupt, worm-eaten, rotten!

[45] Ending House Arrest for Property and other Serious Crimes by Serious and Violent Offenders Act, Bill C-16, 40th Parliament, 3rd session (Can). As an aside, it seems there is a serious overuse of the word "serious" in recent Canadian legislative titles!

Political short titles do not always survive the parliamentary process. In the Canadian federal jurisdiction, a number of Bills were amended to remove their short titles and subsequently enacted without a short title (such as the *Fighting Internet and Wireless Spam Act* and the *Cracking Down on Crooked Consultants Act* previously mentioned[46]). In Australia, the New South Wales government introduced a Bill entitled the *State Revenue Legislation Amendment (Howard and Costello) Bill* in 1996, which proposed increasing various state taxes ostensibly as a result of funding rearrangements by the newly-elected Australian federal government (of which Mr Howard was the Prime Minister and Mr Costello the Treasurer). As the New South Wales government did not control the upper house of the New South Wales parliament, the short title of the Bill was amended and ended up being enacted as the *State Revenue Legislation Further Amendment Act 1996*.[47]

Should the short title of principal legislation be amended by subsequent amending legislation?

I previously referred to the Victorian example of the *Prostitution Control Act 1994*, the name of which was changed to the *Sex Work Act 1994* by an amending Act in 2010.[48] The issue with changing the title of principal legislation is that for people unaware of the change it becomes more difficult to locate the legislation, or to realise that the newly named legislation is in fact the existing legislation under another name.

At least in Victoria, when the title of the Act was changed, the reference to the year in which the Act was enacted was preserved. By contrast, in the Australian federal jurisdiction, the name of the *Industrial Relations Act 1988* was changed (in an amendment buried away in Part 1 of Schedule 19 to the *Workplace Relations and Other Legislation Amendment Act 1996*) to the *Workplace Relations Act 1996*.[49] So both the name of the Act and the year of its enactment were changed. This makes it even more difficult to identify the Act, and is a practice that I for one would not advocate.

Of course, measures can, and are, taken to overcome the difficulties arising with the retitling of legislation. For example, the Victorian legislation website keeps an entry for the Act under its original title, which directs the reader to the entry (containing a full version) of the Act under its new title.[50]

Conclusion

The study of the titles of legislation is quite fascinating and turns up some wonderful oddities. There are many similarities but also some marked differences among the various jurisdictions. Some jurisdictions are becoming increasingly adventurous in the titling of their

[46] Above, n 3 & 39.

[47] Act no. 55 of 1996 (NSW).

[48] Section 42(1) of the Consumer Affairs Legislation Amendment Act 2010, Act no. 1 of 2010 (Vic).

[49] Act no. 60 of 1996 (Cth).

[50] See http://www.legislation.vic.gov.au.

legislation, or coming under increasing pressure from their political masters to do so. Whether this trend is particularly helpful to the reader or researcher of legislation is debatable. Perhaps only time will tell.

The Practice of Legislative Drafting in Samoa, a Plural Society of the South Pacific

Lalotoa Mulitalo[1]

Abstract:

Legislative drafting is one of the most important legal tasks carried out by lawyers in government. Every law drafted may impact on the lives of the total population of a society. Essential to being a legislative counsel are qualities including clarity of thought, problem solving skills, a commitment to plain English and a passion for precision. Further essentials for legislative counsel practising in societies with plural legal systems is appreciation of the historical background, the norms, traditions, and the variety of languages spoken in those societies, and the resultant (in theory) dominant governmental systems, legal systems and Parliamentary systems. This paper discusses the challenges of drafting legislation in Samoa, a society in which legal pluralism prevails. The paper ends with proposals for addressing these challenges.

Introduction

This paper highlights the main challenges faced by the practice of legislative drafting in a plural society in the South Pacific, particularly in Samoa. Needless to say, the challenges

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experienced in Samoa are similarly faced by neighbouring South Pacific societies. Examples are therefore drawn not only from Samoa but from other South Pacific societies.

The South Pacific - Challenges in legislative drafting

(a) Capacity

Legislative drafting is not a popular area of practice in the legal profession of the Pacific islands. Generally, the first time a graduate hears of legislative drafting is when he or she starts working in the public service. After independence, many regional countries continued to rely on overseas drafters for legislative drafting services, as often there has been a lack of interest from young qualified lawyers to commit to legislative drafting as a career.[2]

Legislative counsel are public servants who draft legislation to support the government's legislative program. In the Pacific islands, the main offices responsible for legislative drafting are the Attorney General's offices and Parliamentary Counsel offices.[3] Parliamentary Counsel offices are usually housed under the Attorney General's Office or the Solicitor General's Office.

For Tuvalu in 2009, there is no division of roles for legal staff within the office, and all six legal staff undertake civil, criminal, advisory and counsel work.[4] Legislative drafting is carried out predominantly by senior lawyers. In Kiribati, in 2009, the ten legal professionals in the Office of the Attorney General were responsible for all criminal, civil, land matters, litigation on behalf of the Government, and advising the Government on general legal matters including Bills for Parliament.[5] In the Cook Islands, in 2008, four professional staff in the Crown Law Office advised the Government and Parliament in all legal matters and managed the legislative program of the government.[6] In Tonga in 2009, there were 11 qualified professional legal solicitors including the Solicitor General and the Attorney General. The Crown Law Office was responsible for providing legal advice to His Majesty's Cabinet, Government Ministries and Departments; drafting legislation; conducting criminal

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[2] Nainendra Nand, Senior Lecturer, Division Coordinator of Law, University of the South Pacific, School of Law – *"Distance Education and its Contribution to Good Governance in the Pacific"* (2008).

[3] Tuiloma Neroni Slade, "Law Reform Potential in the Pacific Area" (Paper presented at the Australasian Law Reform Agencies Conference, Welling NZ, 13-16 April 2004).

[4] Tuvalu Country Report 2009 - Pacific Islands Law Officers Network website Annual Meeting 12-16 December 2009, Apia, Samoa http://www.pilonsec.org/.

[5] Kiribati Country Report 2009 - Pacific Islands Law Officers Network website Annual Meeting 12-16 December 2009, Apia, Samoa http://www.pilonsec.org/.

[6] Cook Islands Country Report - Pacific Islands Law Officers Network, Annual Meeting 5-9 December 2008, Port Vila, Vanuatu < http://www.pilonsec.org/.

prosecutions; civil litigation; and facilitating community law initiatives promoting the rule of law and legal awareness.[7]

The shortage of legislative counsel in small island jurisdictions in the Pacific is a persistent problem that has remained since the Pacific islands gained independence from colonial rulers.

(b) Further capacity needed with the establishment of Law Reform Commissions

Some countries in the Pacific Islands have established, or are establishing or re-establishing, law reform commissions (LRCs).[8] Where legislation is the best option to give effect to reform, the end product of the LRC's work is draft legislation. Where the review and finalisation of drafted legislation from the LRCs fall on the legislative counsel of the Attorney General's Office, Solicitor General's Office or Crown Counsel Office, this increases the workload of the government legislative counsel. Ideally, legislative counsel should be placed in the LRCs similar to other advanced jurisdictions, although due to the lack of capacity of local South Pacific legislative counsel, this may not be realistic. Some South Pacific LRCs[9] are restricted to law reform functions while the revision and consolidation are regulated under separate Act. Other Pacific LRCs[10] are responsible for all law reform, revision, review and the consolidation of laws. The establishment of South Pacific LRCs increase the demand for legislative counsel.

(c) Government ministry lawyers

Many Government Ministries of the South Pacific do not have government ministry lawyers. The bulk of the legal work is carried out by the Attorney General's Office, Solicitor General's Office or Crown Law Office. The assistance of the government ministry lawyers significantly reduces or prevents delays in developing draft legislation, for example in identifying the loopholes with the current law before a new law is proposed. Although there are a few government ministry lawyers in Samoa, they can hardly assist the Office of the Attorney General with their complex in-house legal matters or matters under court proceedings, as they have their own working demands from within the Ministry.

(d) Supervisors and mentors

Due to the ongoing shortage of legislative counsel there is a lack of lawyers with relevant drafting skills to take up supervisory roles. This is unfortunate as the skill of legislative

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[7] Tonga Country Report - Pacific Islands Law Officers Network, Annual Meeting 12-16 December 2009, Apia, Samoa http://www.pilonsec.org/.

[8] Law Reform Commission Act 1975 (Papua New Guinea); Law Reform Commission Act Cap 26 (Fiji); Law Commission Act Cap 115 1980 (Vanuatu); Law Reform Commission Act 1994 (Solomon Islands); Law Reform Commission Act 2008 (Samoa); Law Reform Act 2007 (Tonga).

[9] Law Reform Commission Act 2008 (Samoa).

[10] Papua New Guinea, Solomon Islands and Tonga.

drafting is developed faster with the guidance of experienced senior legislative counsel, especially as most or all drafting work is peer reviewed or is often reviewed by a fresh pair of critical eyes. Peer reviewing of draft Bills and subordinate legislation is highly recommended but this may sometimes be impossible with the shortage of legislative counel. Supervisors and mentors would perhaps reduce the high turnover each year from the Offices of Attorney Generals, Solicitor Generals and Crown Law Offices in the Pacific.

(e) Policy instructions

In more advanced countries, the policy that is developed by the Ministries is given by way of 'drafting instructions' or 'policy instructions' to Parliamentary Counsel in the Office of Parliamentary Counsel. Legislative counsel translate that policy into law. They do not make policy. This fundamental principle of legislative drafting is very difficult to practise in the South Pacific. If this legislative drafting principle is to be strictly adhered to, there would hardly be any laws tabled before Parliament for debate. One of the biggest challenges to a legislative counsel in the South Pacific is receiving incomplete or minimum policy instructions for a draft Bill. As in most countries of the South Pacific, the few legislative counsel are at times requested to develop policy. Although this challenge is global, the principle that legislative counsel are not policy makers must be respected to allow for a clear understanding of the scope of responsibilities in developing legislation.

(f) Consultation

Perhaps the most important step for developing effective laws is consultation. In addition to policy development, consultation is the responsibility of the instructing Ministry. It is the duty of the Ministry to carry out adequate and reasonable consultation. Although preparing consultations is not the responsibility of the legislative counsel, the success or failure to carry out consultation impacts on the effectiveness or ineffectiveness of laws.

Some of the obvious challenges to consultation include the lack of funding for consultation; getting the relevant legal expertise fluent in both the English and the Samoan language to explain the policies and the draft laws; time restrictions; and the remoteness of some residential areas. To date, participation in consultation on new laws is not very popular in the indigenous communities, which may be a result of lack of awareness of government's proposed laws or a disinterest in western created laws.

Is there a duty for the government to consult? There is no law obligating the government (through the instructing Ministry) to consult, although it is mandatory under the Legislative Drafting Handbook of Samoa. As it is with handbooks and policies, no enforcement procedures are available for non-compliance.

Drawing comparisons from the Canadian and the Australian legal systems, a research paper on the protection of indigenous rights recorded that the courts in Canada ruled that the Canadian government has a duty to consult on new laws that may have an impact on the

aboriginal or treaty rights of aboriginal people.[11] This obligation is based on the recognition given to these rights by section 35 of the *Constitution Act, 1982*.[12] The Supreme Court of Canada has set out some of the principles of this duty some of which are as follows.[13] Full information on the proposed laws and their likely effect on the Aboriginal people must be given to the Aboriginal people. The government must inform itself of the relevant practices of the Aboriginal people, and of the views of the Aboriginal people on the proposed measures. Consultation must be meaningful and reasonable and must involve adequate participation and representatives of the Aboriginal people. Restrictive timeframes will not justify the absence of proper consultation. There must be reasonable dissemination of information. Requested consultations cannot simply be denied. So long as every reasonable effort is made to inform and consult, such efforts would suffice to meet the justification requirement.

Although the Canadian case law is only persuasive in Samoa and the Pacific, it is helpful to indicate how the process of "consultation" has developed overseas.

The position in Australia as noted by Behrendt is that Australian courts have not decided that a fiduciary obligation is owed by the Crown when dealing with native title interests;[14] there has been no acceptance of a more general trust-like relationship; and there is no duty owed to the government to consult when infringing existing native title interests.

What if consultation is impossible or cannot be carried out due to factors beyond the control of the government, for example the associated costs or demographic characteristics of the South Pacific islands? As stated earlier, the duty may be discharged where every reasonable effort is made to inform and consult.

(g) International model laws – legal transplants

Watson first used the term 'legal transplant' in the 1970s to indicate the moving of a rule or a system of law from one country to another, saying that legal transplants have been common since the earliest recorded history.[15] This may also be seen from the development of constitutions of several countries, where nearly 50 British Commonwealth nations derived constitutions from the British parliamentary system.[16]

It is dangerous to adopt wholesale legal transplants as this could result in disastrous consequences. Teubner expresses his preference for the term 'legal irritants' as opposed to

[11] Larissa Behrendt, *The Protection of Indigenous Rights: Contemporary Canadian Comparisons*, Published by the Department of the Parliamentary Library, 2010.

[12] Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11.

[13] R v Jack (1995) 16 BCLR (3d) 201 CA; R v Noel (1995) 4 CNLR 78; R v Nikal (1996) 1 SCR 1013.

[14] See above n. 11.

[15] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh, 1974) 21.

[16] William Dale, "The Making and Remaking of Commonwealth Constitutions" (1993), 42 *International and Comparative Law Quarterly* 67.

'legal transplants'[17] He says that when a foreign law is imposed on a domestic culture, it becomes an irritation triggering a whole series of new and unexpected events; it irritates law's binding arrangements, so much so that the internal context will undergo fundamental change to accommodate the legal transplant.

Transplantation however, may be possible if it is carried out with deference towards local conditions.[18] Transplants may also be useful where the policies promoted by the transplanted laws are the same as the policies of the host country. However, it is a challenge for legislative counsel to modify legal transplants to suit the local circumstances. They must modify and develop a local draft with caution as a legal transplant has been developed under a foreign social and political system. The legislative counsel relies heavily on the instructing Ministry for direction on the suitability and appropriateness of the policies promoted by the transplant laws to the local environment. The legal transplant must be mutated and altered into many drafts before it is transformed into a draft that promotes the local policies and is more fitting to the local setting.

(h) Language

In many South Pacific societies, laws are first drafted in English before they are translated in the local language and other official languages. There are, on the one hand, advantages of maintaining the existing legal system in which English is the mode of communication. Apart from being a working tool of the system, English is also the language of international trade and commerce. To preserve a position in international trade upon which the Pacific economies are also dependent, the continued use of English is necessary.[19]

On the other hand, in Samoa as in most South Pacific societies, the local language is an integral part of Samoan identity and cultural consciousness. Having laws in both the Samoan and English languages is in the interest of justice. Although legislation may be translated by another group of people outside of the drafting division (for example, the Translation Division in the Office of the Legislative Assembly Samoa) the legislative counsel must ensure that the translation is appropriate. In some cases, this is another cause of delay as the legislative counsel tries to address translation queries.

[17] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences (1998) 61 (1) *Modern Law Review* 12.

[18] Lisa Toohey, 'Transplanted Constitutionalism or Transplanted Constitutions?' (Paper presented at the Conference on Constitutional Renewal in the Pacific Islands Conference, Port Vila, Vanuatu 2005).

[19] Tony Yen, 'Bi-lingual Drafting in Hong Kong', (2010) *The Loophole*, Issue No. 2 2010 http://www.opc.gov.au/calc/docs/Loophole/Loophole_Aug10.pdf.

(i) Competition for limited office budget

As the Attorney General's Office, Solicitor General's Office and Crown Law Offices are small offices, and some are Divisions of a government Ministry,[20] there is nearly always competition for small budget allocations from government. Legislative drafting is usually the last professional division to be considered with the competing interests from other professional divisions, for example criminal prosecution and civil litigation. Legislative counsel need up-to-date resources to assist with legal research to develop effective legislation, for example. up-to-date library material and computers, fast and uninterrupted Internet connection, access to the most current legal material online, and access to local court judgments (very difficult to access in most South Pacific societies). It is difficult to develop legislation in a speedy manner without the relevant material and technology.

(j) Funding influences on drafting programs

Legislative counsel draft legislation to support the government's legislative program. Due to budget constraints and other factors, most governments of the South Pacific do not have expressly written legislative programs, or at least not programs that are certain and realistic. Bills and regulations are drafted according to priority as directed by the Cabinet and the Ministries.

One of the main factors which influences government legislative program is overseas funding; those who fund the drafting of a law have influence in prioritising that law. Although a Government Ministry may engage a private consultant to draft that law, the onus is on the Attorney General and the legislative counsel of the Office of the Attorney General to see that the drafting is in line with the local requirements. Thus, engaging overseas drafters does not necessarily lessen the burden on the local legislative counsel. Sometimes it creates more work for them when the consultant does not comply with local drafting requirements or does not take into account cultural and local environments in the draft Bill or regulations.

Other factors influencing legislative program considerations are global events (for example, September 11, 2001 and the counter-terrorism reforms that followed) and natural disasters from global warming and environmental degradation.

(k) Legislative drafting in a plural society

Before this challenge is discussed, it is important to identify what legal pluralism is. Griffith says that legal pluralism is where law and legal institutions are not sourced from 'one' system; rather, law and legal institutions are sourced from the self-regulatory activities of the

[20] For example, the Attorney General's Chambers of Solomon Islands is part of the Ministry of Justice and Legal Affairs.

diverse social fields present in society.[21] These self-regulatory activities, continues Griffith, may support, complement, ignore or frustrate one another; and the 'law' which is actually effective on the 'ground floor' of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation and isolationism. In turn, Sack says that legal pluralism involves an ideological commitment that opposes monism, dualism and any other form of ideology.[22] The definitions of legal pluralism recognise that two or more legal systems can operate separately within a society. It therefore describes the situations of the South Pacific countries in that it recognises that customary laws, norms and practises may be recognised alongside, and at the same time as, western laws and systems. In relation to legislative drafting, ineffective laws result when laws are drafted without consideration of the social and legal pluralism characteristics of the South Pacific societies.

As public servants, legislative drafters are obligated to draft laws from policies formulated by governments. All laws are developed for the benefit of the people whom the laws are designed to govern, although the reality is that not all laws accommodate everyone. If the people whom the laws are designed to govern are indigenous populations practising customary law, the legislative drafting practice must take a conscious approach to legal pluralism, recognising the benefits of customary practises being part of the formal laws for the indigenous societies. The practices that benefit the indigenous populations must be reflected in draft laws.

Perhaps the tendency to draft without consciously considering the complexities of legal pluralism results from the training received first as a lawyer, then as a legislative counsel. Although one is taught to be conscious of the peculiarities of society in which one drafts, a conscious awareness of "legal pluralism" issues is not expressly part of a legislative counsel's professional training. South Pacific legislative counsel need to consciously draft with legal pluralism in mind. A few examples of legal pluralism considerations are as follows.

In terms of terminology, the definition of "family" in the South Pacific is not the same as "family" from the western perspective. "Trust" and "beneficiary" have different meanings from the common law and customary law perspectives.[23] In drafting a dispute resolution mechanism for certain offences; customary dispute resolutions mechanisms may be far more effective than a court system. Given the lack of capacity of legislative counsel in the Pacific and the high demands on their time, it is difficult to set aside time to consider legal pluralism while drafting legislation. In the race to put urgent drafts before Cabinet where all legislative

[21] John Griffiths, 'What is Legal Pluralism', (1986) 24 *Journal of Legal Pluralism* http://keur.eldoc.ub.rug.nl/FILES/wetenschappers/2/11886/11886.pdf .

[22] P.G. Sack, 'Legal Pluralism: Introductory Comments' in Peter Sack and Elizabeth Minchin (eds) *Legal Pluralism, Proceedings of the Canberra Law Workshop VII* (Pink Panther, ANU Canberra 1986) 1-16.

[23] On how some common law terms have been used to describe customary concepts, see Jennifer Corrin Care, "Cultures in Conflict: The Role of the Common Law in the South Pacific" (2002), 6 Journal of South Pacific Law, http://www.paclii.org/journals/fJSPL/vol06/2.shtml.

drafting work is a priority, identifying legal pluralism issues in a draft law is hardly a priority for a very busy legislative counsel.

Is considering legal pluralism an issue particular to legislative counsel? In more advanced societies with available resources, policy development is the best stage to address legal pluralism. However, in the South Pacific there are a few or no policy developers in government Ministries. Legislative counsel are usually pushed to make policy decisions in the Pacific. Until the government Ministries can develop and be held accountable for their own policies, the complexities of legal pluralism must be a conscious consideration in the process of legislative drafting.

Legislating legal pluralism

There is a need to obey the constitutional mandate to recognise and promote customary law.[24] There is a need to increase the use of customary forums for the resolution of customary land disputes. There is a need to utilise and combine customary law and legislation. This has advantages including stakeholder support and strengthened enforcement mechanism.[25]

Erica Techera has proposed that the customary law be formally recognised alongside the western legal system thereby creating a pluralist system; and there should be a functional recognition of customary law within the national legal framework but for defined and specific purposes.[26] An attempt to allow culture and law to work side by side is where customary rules are recognised and legislated into the written law. Some examples are the *Underlying Law Act 2000* of Papua New Guinea; the *Recognition of Customary Courts Act 2000* of Solomon Islands; the *Village Fono Act 1990* of Samoa, and the *Fisheries Bylaws 2008* of Samoa.[27] Vanuatu's Constitution provides for the use of customary forums for the resolution of customary land disputes.[28]

Most of the attempts at harmonising customary law and state law are proposed to be through the incorporation of customary law into state law, or the development of legislation to codify customary law. For effective legislation, this involves the skills of very experienced legislative counsel. Codifying customary law represents a whole different set of issues,

[24] Jennifer Corrin, "Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific" (2009), 59 *Journal of Legal Pluralism* 29.

[25] Erika Techera, "Local Approaches to the Protection of Biological Diversity: The Role of Customary Law in Community Based Conservation in the South Pacific" (August 2007), Macquarie Law Working Paper No. 2007-2. Available at SSRN: http://ssrn.com/abstract=1011081.

[26] Ibid.

[27] On the Underlying Law of PNG and the Customs Recognition Act of Solomon Islands, see Jennifer Corrin Care and Jean G. Zorn, "Legislating Pluralism, Statutory Developments in Melanesian Customary Law" (2001), 46 *Journal of Legal Pluralism*.

[28] For an analysis of the difficulties of implementing this constitutional requirement, see Anita Jowitt, "Island Courts in Vanuatu" (1999), 3 *Journal of South Pacific Law* – Working Papers.

which are discussed below. Where there is attempt to codify customary laws in the South Pacific, the following discussion presents some of the challenges to codification to be addressed by law reformers and legislative counsel.

(a) Advantages of codification

Codification will bring about certainty; it will weed out irrelevant areas and uncertainties in the law leaving certainty behind.[29] The codification of customary law is an attempt at addressing loopholes, inadequacies, and the harsh consequences of some customary legal applications. Writing on developing countries like Nigeria, Reginald Akujobi Onuoha states that codification is essential for a reliable legal system, especially in developing countries where less regard is paid to the rule of law (even where the law is adequately enshrined (in the constitution).[30] The challenge however is that during the colonial period, although customary law was expressly recognised, the colonial administration and its laws tended to emphasize the superiority of common law over customary law.[31]

The complexities of codifying customary law are highlighted by Simon Roberts, who noted that where lawyers had been widely engaged in the recording of customary law in Africa for more than a decade,[32] one would have thought there would be less disagreement to date as to what exactly they are looking for and how best to find it. On the contrary, Simon says, doubt and disagreement seem to be multiplying rather than approaching resolution.[33]

(b) Challenges to codification

Freezing customary law

Once written and promulgated, the law becomes fixed, inflexible and loses its customary status. Unlike the customary settings where amendments to customary laws are fluid and flexible, any further role (or wish) of the indigenous population for amendments would be subject to formal and unfamiliar procedures, which may cause reluctance, delay, costs, distance and limited access. This may discourage their involvement in further amendments

[29] Reginald Akujobi Onuoha, "Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the rescue" (2008), 10 *International Journal of Not-for-Profit Law* (No.2, April 2008/79).

[30] Ibid.

[31] Muna Ndulo, "Ascertainment of Customary Law: Problems and Perspectives with special reference to Zambia" in Alison Dundes Rentlen, Alan Dundes (eds.) *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*: Vol 1 (University of Wisconsin Press: 1994).

[32] Although Kenya's government decided earlier back in 1960 to start on the task of ascertaining and restating the customary law of the various tribes in Kenya; also see Obeid Hag Ali, "The Conversion of Customary Law to written law", in Alison Dundes Rentlen, Alan Dundes (eds.) *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*: Vol 1 (University of Wisconsin Press: 1994).

[33] Simon Roberts, "The Recording of Customary Law: Some problems of method" in Alison Dundes Rentlen, Alan Dundes (eds.) *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*: Vol 1 (University of Wisconsin Press: 1994).

to the written customs.[34] There is the danger that codification can freeze laws so that they stop evolving and can also remove discretion in the way these laws are applied.[35]

According to Ali, customary norms and standards are too flexible and uncertain to be encompassed in precise phraseology (English concepts).[36] It is the flexible uncertainty of customary norms that gives them life and endurance; to deprive them of this flexibility is to deprive them of life.[37] Customary law reduced to writing and then applied in court necessarily undergoes change; and this change may result in the disregard for the codified customary law.[38] Based on the nature of customary law, codification would run the risk of being misapplied and disregarded.[39] How can customary law be drafted in a way that it is not frozen?

An option in documenting customary law offered by Danino is to include in the legislation a clear proviso that any such description is a snap shot of a moving object and that the description does not freeze the law.[40] According to Danino, this would allow customary law to continue to evolve naturally with the changing values of the communities who are subject to the law.[41] A legislative counsel needs to be very skilful in drawing up legislation that does not freeze custom.

Ascertaining customary law

Customary law is extremely diverse; each community evolves its own laws at its own pace; the community determines the law.[42] One way of ascertaining customary law is to call witnesses. Another way is to call assessors to attend to proceedings and then advise on customary law. But is customary law a question of law or a question of fact? In citing a Zambian case where the Court had assessors and each party had expert witnesses, Ndulo said

> It is objectionable on political and legal grounds that the indigenous law of any country and a law which controls and regulates the greater majority of the people of the country

[34] T. W. Bennett and T. Vermeulen, "Codification of Customary Law" (1980), 24 *Journal of African Law at* 206-219.

[35] Roberto Danino, "Customary Law Systems as Vehicles for Providing Equitable Access to Justice for the Poor and Local Governance, the Peruvian Experience" in *Leadership Dialogue with Traditional Authorities*, Kumani, Ghana, December 5, 2005.

[36] Obeid Hag Ali, "The Conversion of Customary Law to written law", in Alison Dundes Rentlen, Alan Dundes (eds.) *Folk Law: Essays in the Theory and Practice of Lex Non Scripta*: Vol 1 (University of Wisconsin Press: 1994).

[37] Ibid.

[38] Above, n. 34.

[39] Ibid.

[40] Above, n. 35.

[41] Ibid.

[42] Above, n. 34.

> should be a question of fact needing proof while the received law in the same country does not require proof and is a question of law.'.[43]

It is very difficult to ascertain customary law where versions on customary practises differ.

Uniformity

After ascertaining customary law, it must be unified. A code of law implies the existence of uniformity (be it geographical or cultural) in relation to the law. In many cases it is a difficult task to decide which system of tribal law is to be elevated to the favoured position of the code.[44] The object of unification is to have one central law or general system of law which would apply to everyone. Muna Ndulo points out that one of the problems of unification is the danger of introducing too many legal technicalities and too much customary law into the body of customary law and native court procedure.[45] Ndulo goes on to say that in a unified system, courts should reflect some of the values of customary law procedures.

Collecting evidence of customary law

Collecting evidence of the necessary information concerning customary law presents difficulties. Bennett and Vermeulen state that consultation with tribal authorities is one method. However, while councillors and chiefs may be considered to be wiser in legal matters than most others, this quality attaches to them by virtue of their general status in the community as figures of authority.[46] There is no elite group in a position to dictate the terms of the law.

A critique by Ali of the Restatement carried out in Kenya in 1960 by Cotran is as follows - an essential part of customary law is that it cannot be divorced from its social context and still purport to give a complete picture of tribal law.[47] According to Ali, Cotran, in assuming that the rules of customary law are the only decisive factors in the judicial process of tribal societies, endeavoured to be as exact as possible in collecting customary rules. But the customary practises and procedures, the judicial personnel, their attitudes, the ways and techniques by which they arrive at a settlement that contributes towards social harmony, are no less part of the customary law than abstract rules of substance.[48] Codified customary laws must purport to give (as much as possible) a clear picture of customary law.

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[43] Above, n. 31.

[44] Above, n. 34.

[45] Above, n. 31.

[46] Above, n. 34.

[47] Above, n.36.

[48] Ibid.

Origins of 'code' and 'customary law'

Codification is a process of legislation-making, originating from government as a central political authority, in a positivist approach. According to Bennett and Vermeulen, by reason simply of their sources, a code is necessarily in opposition to customary law. Consequently, the social distance between the legislator and the people and the possibility that the views of the two will not coincide is increased.[49]

Difficulty in drafting

Due to the diversity and the flexibility of rules of customary law, the legislative counsel will experience great difficulty in two areas. The first difficulty is selecting the rules to be reproduced in the code; and the second difficulty is expressing them with the sensitivity necessary to reflect accurately the manner in which they function.[50] Before any attempt to describe the rules of customary law, a legislative drafter must be familiar with the social orders in which the law operates.

Enforceability

The drafters of a Code may be unfamiliar with the social context within which customary law evolves. Whether they share the attitudes and values of the people to whom the code will be applied is an important consideration for enforceability.[51]

Suggested resolution of legislative drafting challenges

(a) Constitution vetting and customary vetting

Most South Pacific constitutions require customary laws to be considered in developing laws. For Samoa, the preamble of the Constitution declared that Samoa is founded on God; and that Samoa is an Independent State based on Christian principles and Samoan custom and tradition. The Constitution established an institution, 'Parliament', with powers to make laws. The power to make laws must be exercised based on Christian principles and Samoan customs and traditions. Indeed, any institution established under the Constitution must be based on and uphold the principles declared in the preamble. At least this seems to be the shared belief of the vast majority of the people of Samoa at the making of the Constitution. As noted by Meleisea,,

> The most publicised section of the Constitution was part of the preamble which declared that "Western Samoa should be an Independent Stated based on Christian principles and Samoan customs and traditions." For the Samoans who had not seen the constitution or who were not fully aware of the contents and functions of a Constitution in a modern state – and this constituted the vast majority – the fact that Samoa was

[49] Above, n. 34.

[50] Ibid.

[51] Ibid.

> founded on God and their own customs and traditions gave them pride and was sufficient reason to celebrate. Photographs of the three Tama-a-aiga which were circulated throughout the country and the sermons from the pulpits of the various churches reinforced the two founding principles in the minds of the people.[52]

Similarly, in other South Pacific societies, Parliaments are empowered by the Constitutions to make laws for peace, order and good governance, and to make laws for all matters that can give effect to the Constitution.[53] If customary laws lead to peace, good order and governance, then Parliaments should pass such laws. Accordingly legislative counsel must draft laws that accommodate customs and usages. On this basis, the same way laws are vetted as to whether they comply with the Constitution, laws should be vetted as to whether they comply with customary norms.

(b) Legal pluralism and policy making

Legal pluralism issues are best discussed at the level of policy development. The responsible Ministry must ensure they are addressed and must also raise and discuss them in public consultations. Where legislative counsel are involved in policy development, they must encourage discussion of legal pluralism issues raised or relevant to a draft law being drafted or under consultation.

Completed and clear policy instructions result in a speedily drawn up Bill. Policy professionals and employees need to be well trained to assist legislative counsel. More importantly, it is at the policy development stage that legal pluralism complexities of proposed legislation or amendments must be identified and addressed. Where these issues are thoroughly addressed early and addressed in the policy instructions, this will significantly reduce the workload of a legislative counsel.

(c) Framework legislation for legislative drafting

Perhaps the only South Pacific country with legislative drafting legislation is Papua New Guinea with their *Legislative Drafting Service Act 1972*. This is a government funded service. No legislative counsel employed under this Act may work in private practice at the same time. The general functions of the Service (section 16) include drafting proposed laws for introduction into the Parliament, drafting amendment laws and drafting subordinate legislation. If legal pluralism is to be taken seriously, this legislation may be amended to include express provisions mandating legislative counsel to address legal pluralism issues in developing legislation and legislative drafting.

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[52] Malama Meleisea, The Making of Modern Samoa – Traditional Authority and Colonial Administration in the Modern History of Western Samoa (1987), Institute of Pacific Studies, University of the South Pacific 212.

[53] Constitution of Kiribati s 66; Constitution of Tuvalu s 84; Constitution of Solomon Islands 1978 s 59; Constitution of Papua New Guinea 1975 s 109.

(d) Principal legal offices (AG, SG, CLO)

Except for Tonga, the Offices of the Attorney General and Solicitor General are usually established in the Pacific Constitutions[54] giving the Attorney General or Solicitor General the role of Principal legal advisors to government. As principal legal advisor, one of the main functions of the Attorney General is to draft legislation and review legislation, subsidiary legislation and all legal instruments for government.

Vanuatu's State law Office Act Cap 242 section 15 provides for the position of Parliamentary Counsel whose principal function is to draft legislation on behalf of the Government as directed by the Attorney General.

Apart from Vanuatu, it appears that the legislative drafting function of the Government is not expressed in the form of legislation or regulations elsewhere in the Pacific. The principal legal offices of the South Pacific may require as office policies, that legislative counsel ensure that the instructing Ministries consider legal pluralism and that legislative counsel themselves adopt a conscious approach to legislating pluralism where this benefits the South Pacific societies.

(e) Law reform commissions

The functions stipulated in legislation setting up Law Reform Commissions (LRCs) in PNG, SI and Vanuatu include reviewing laws in relation to the restatement, codification, amendment or reform of traditional or customary laws. One of the objectives of Samoa's LRC is to 'facilitate review, reform and development of the laws of Samoa in order to promote Samoan custom and traditions.[55] Although not specifically stated, these objectivs are reflected in Tonga's legislation where laws are to be reviewed so they are relevant and suitable to the changing circumstances.[56] The South Pacific LRCs are therefore legally mandated to consider and promote customary laws in law reform. This legal empowerment needs to be more fully utilised by the LRCs of the South Pacific.

(f) Professional training

Developing the professional capacity of local legislative drafters is important. The Professional Diploma in Legislative Drafting (PDLD) offered by the University of the South Pacific to potential legislative counsel of the South Pacific must introduce and include an approach to legislating pluralism. As it currently does not include this approach in its curriculum, this may be a long term plan for the USP and coordinators of the PDLD to consider. For the time being, it may suffice to include a session on 'legislating pluralism' to the PDLD Workshop which closes up the program. This can introduce awareness to the

[54] For example, the Constitution of the Independent State of Samoa Article 41, the Constitution of Kiribati s 42, the Constitution of Tuvalu s 79; and the Constitution of Solomon Islands 1978 s 42.

[55] Law Reform Commission Act 2008 (Samoa) s 4.

[56] *Law Commission Act* (Tonga) s (2) (c).

students that the western process of legislative drafting does not fit neatly into the Pacific societies. Rather, the legislative drafting process taught and adopted from the western world must be modified to fit the local circumstances of the Pacific, if the Pacific is to have suitable and effective laws.

In-country training should ideally be run by those who have practiced legislative drafting in a legal pluralistic society. Such training may include training exercises with examples taken from local legislation that may already attempt to accommodate legal pluralism and identifying their strengths and weaknesses.

For training held outside of the South Pacific islands, for example in Australia, it may be helpful to consider how Australia develops legislation addressing the Aboriginal peoples' issues or the Torres Straits issues, and how New Zealand does the same with Maori issues. Australian and New Zealand legislative drafting trainers are generally very helpful and have given much assistance in developing legislative drafting in the South Pacific.

(g) Legislative drafting manuals

Legislative drafting manuals and handbooks are very useful to have in place for local legislative counsel, potential local drafters or overseas drafters engaged to do legislative drafting work in the South Pacific societies. Legislative drafting manuals within the South Pacific societies must include requirements such as understanding and recognizing the legal pluralistic nature of the South Pacific societies. The consideration of legal pluralism issues may be included in the legislative handbooks of countries with no legislative drafting framework legislation like PNG. South Pacific legislative drafting handbooks or guidelines may include in them requirements for all legislative counsel to take into account issues of legal pluralism in legislative drafting.

It is important that drafting manuals be developed internally rather than adopting a drafting manual of a developed country which has undergone review and amendments over the years. Local stakeholders, including Ministries and policy makers, should be actively involved in developing manuals to encourage a good working relationship between the legislative counsel and policy makers. This may facilitate a stronger partnership to respond effectively to the complexities of legal pluralism in law making.

(h) Regional offices

Regional offices with a mandate to develop legislation for the South Pacific islands need to take account of legal pluralism in developing legislation for the Pacific islands. These Offices include the Legislative Drafting Division under the Political, Governance and Security Programme of the Pacific Islands Forum Secretariat, the Regional Maritime Programme of the Secretariat of the Pacific Community, and the SPREP to name a few.

(i) Legal pluralism conferences

A final suggestion is that more 'Legal Pluralism' conferences or dialogue should be encouraged in the South Pacific. Legal pluralism raises current and live issues to be addressed. Open dialogue is encouraged in conferences and workshops where academics, students, researchers, and professionals of various areas come together to share research, findings and expertise on 'legal pluralism' issues. These are excellent forums for the senior and the young professionals to communicate and share experiences and propose resolutions to legal pluralism complexities in the South Pacific.

Conclusion

In many Pacific islands, issues of legal pluralism have long been identified, albeit without the conscious understanding that it is an issue of legal pluralism, and without awareness that they need to be specifically addressed. The common attitude in most South Pacific societies is that the western legal system is the dominant system and prevails over customary systems. The constitutions of the South Pacific societies have been put at the apex for so long that these societies with indigenous populations believe it is the way of life, and that customary law is to be practised with caution and away from the western law enforcers.

Colonialism and consequently legal pluralism are lasting legacies. The imposition of western legal transplants (constitutions and legal systems) in the South Pacific societies resulted in the South Pacific societies taking the irreversible path into the capitalist western systems. To address issues associated with having two or more legal systems, the South Pacific societies need to be strategic, creative and most of all be bold to embrace what is most applicable to Pacific societies, whether it is the customary laws or the western introduced laws or a workable blending of both. After all, each (customary and western) has its own limitations; what works on the ground is what the legislative counsel should try to identify, consult on and promote in developing draft laws. Legal pluralism in law reform is about acknowledging and appreciating these choices and educating the Pacific indigenous populations on these choices. An appreciation of this reality by all law reformers including legislative counsel will form the basis of laws which are relevant and suitable for the South Pacific societies.

A Legislative Counsel's Progress and the Role of Training

Eamonn Moran[1]

Abstract:

Training needs of legislative counsel vary as they progress through their career. This article identifies various milestones in the life of a legislative drafter and suggests the training that it is appropriate at each stage. The value of a drafting office ensuring that drafters are given training is also highlighted.

Introduction

In his play *As You Like It* Shakespeare wrote about the seven ages of Man:

> All the world's a stage,
> And all the men and women merely players,
> They have their exits and entrances,
> And one man in his time plays many parts,
> His acts being seven ages.[2]

In a wonderful piece of writing Shakespeare records Man's progress from infant to schoolboy to lover to soldier to justice to old age and finally to second childhood "and mere oblivion, Sans teeth, sans eyes, sans taste, sans everything".

Legislative counsel too, in the course of their career, go through various stages. Taking a lead from Shakespeare I propose to identify the seven ages of legislative counsel and consider the training that they require at each age to enable them to operate successfully at that age and then to move on to the next age.

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[1] Eamonn Moran is currently working as a consultant legislative counsel. He has been the head of the legislative drafting offices in Victoria, Australia (1999-2008) and Hong Kong, China (2008-2012). This article was presented at the 2011 CALC Asian Regional Conference in Colombo, Sri Lanka on 29 September 2011.

[2] Act II, Sc VII.

Before doing that let's look for a moment at the objective of training. Wikipedia states that the term ***training*** "refers to the acquisition of knowledge, skills and competencies as a result of the teaching of vocational or practical skills and knowledge that relate to specific useful competencies." Wikipedia also refers to the current recognition of "the need to continue training beyond initial qualifications: to maintain, upgrade and update skills throughout working life."

The need for continuing professional development is a critical one for legislative counsel as not only do drafting techniques used in the jurisdiction evolve (or certainly should evolve) but the whole surrounding fabric of law (both common law and statute law) is in a constant state of change. On top of that, regular advances in technology require new learning to enable us to continue to satisfy our need for ever more complex data processing and data management capabilities.

It is also important to recognize that training has two clients: the individual legislative counsel and his or her office. Individual legislative counsel want to enhance their knowledge, skills and competencies so as to equip them to do their job effectively and efficiently and enable them to seek advancement in their career. A drafting office needs skilled legislative counsel to be able to satisfy the heavy demands placed on it for legislation that is competently drafted within ever shrinking timelines. Consequently, it is very much in the interests of the drafting office to ensure that it puts a high priority on training and makes training, appropriate to their stage of development, available to its legislative counsel. But it is not enough to make the training available. It must ensure that the training is availed of through a closely monitored individually-tailored development plan for each legislative counsel.

So much for why training is necessary. Now let's consider what training a legislative counsel needs as he or she moves through the seven ages.

Training through the Ages

(1) The New Recruit

A new recruit starts work in a drafting office with already quite a number of skills in his or her kit bag. If the selection process has been thorough the new recruit will arrive with a strong academic background, high-level analytical skills and good organizational skills. A written test administered as part of the interview process will have established that the new recruit has nicely honed writing skills showing an aptitude for legislative drafting. While training for admission to the legal profession he or she will have picked up some relevant practical legal and administrative skills and knowledge. His or her immediate need is to learn about the structure and role of the drafting office, how it interacts with other government entities and the legislature, how the computer system works and what resources (for example, text books, drafting manual, drafting directions, online research tools, customised templates, clerical and editorial assistance) are available. He or she can also be

given a brief overview of the jurisdiction's interpretation legislation and of other legislation of general application.

A senior legislative counsel will be assigned to take responsibility for teaching the new recruit the basics about drafting and the work environment. Generally basic drafting skills will be taught by assigning a drafting item to the new recruit and giving him or her feedback on the draft. The senior legislative counsel may also try to teach some basic drafting techniques through some exercises. It's a gradual process and it's important not to overload the new legislative counsel or expect too much of him or her too soon. While reading through a textbook on drafting as well as the office's drafting manual or drafting directions is important, the significance of a lot of what he or she is reading will not sink in until he or she has more practical drafting experience.

Of greatest value in these early days is allowing the new recruit to sit in on drafting conferences that senior legislative counsel are holding with clients and observe the interactions and how the senior legislative counsel handles the meeting. Reading through a drafting file also gives the new recruit a good picture of the stages in the drafting process and a sense of the tone with which correspondence is conducted.

It's a good idea to assign a "buddy" to a new recruit, a relatively junior legislative counsel whom the new recruit will feel comfortable asking basic questions about the drafting office and its facilities or procedures.

And, of course, a new recruit is able to pick up a lot of useful information through simple interactions with colleagues.

(2) The Junior Legislative Counsel

By junior legislative counsel I mean one with up to 3 years experience. Hopefully by now the legislative counsel will have had the opportunity to work with a senior legislative counsel on a number of varied items (both principal and amending) and will have personally handled some relatively simple items. Through this apprenticeship scheme the legislative counsel will have picked up many tricks of the trade and will be feeling much more comfortable and confident in handling drafting assignments. The extent to which this is the case depends very much on the quality of the senior legislative counsel, his or her aptitude for passing on knowledge and skills and the time that is available to him or her to do so.

Ideally the drafting office should have in place a system of continuous legal education. This should comprise regular workshops on topics related to drafting, a method for keeping legislative counsel up to date with changes in the law (particularly significant cases on statutory interpretation) and a system for bringing relevant journal articles and other matters of interest to their attention. While occasionally it is appropriate to invite relevant outsiders to give presentations, for the most part it is the senior legislative counsel within the office who should bear the lion share of delivering the continuous legal education programme. Doing so is also a development opportunity for them.

The office should also have in place a well-indexed electronic depository for advice, lecture notes and other knowledge-base items. And of course there should be regular meetings of all legislative counsel at which drafting issues are discussed and experiences shared. An in-house electronic forum is also a great way for broadening communication channels within the office enabling matters to be brought to attention, issues to be discussed, problems posed and solutions quickly offered.

It is, of course, not only junior legislative counsel who stand to benefit from participating in such a continuous legal education programme. All legislative counsel gain and it constitutes an important component in their training programme.

It is at this stage in their career as a legislative counsel that the drafting office needs to consider what form of external training might supplement the in-house training. A listing of available legislative drafting training courses may be found on the CALC website at http://www.opc.gov.au/calc/training.htm. They include distance training programmes offered by several universities, short courses in legislative drafting and postgraduate diplomas in legislative drafting. The extent to which such opportunities may be made available to a junior legislative counsel depends very much on the budget available to the drafting office for training and development and its capacity to allow legislative counsel time off-line to pursue them.

If an office has 3 or more junior legislative counsel it could also consider offering its own in-house intensive drafting course over a number of weeks conducted by an experienced colleague or customised for it by an external consultant legislative counsel.

(3) The Senior Junior Legislative Counsel

I see a senior junior as someone with 3 to 5 years drafting experience. With solid training as a junior legislative counsel behind them this age of legislative counsel is steadily growing in competence and capable of working with greatly reduced levels of supervision. What a legislative counsel at this stage of development needs most is a growing exposure to more complex drafting items. The more hands on drafting experience they can have the better.

If possible, attendance at an international drafting conference will not only give access to seminars on drafting issues but provide networking opportunities and generally let the legislative counsel see that they are not alone but that there is a whole family of legislative counsel out there with similar challenges. Much can be learned over a cup of coffee or a glass of wine.

(4) The Junior Senior Legislative Counsel

The junior senior legislative counsel has 5 to 10 years drafting experience. Depending on the size of the drafting office and the level of demands on it, it may be useful to allow a legislative counsel at this stage to begin to play some role in the vetting or clearing of relatively simple drafts prepared by junior legislative counsel. This is a critical skill and before embarking on it a legislative counsel should be given an opportunity to attend courses on dealing with people and in particular on how to give feedback. A junior legislative

counsel's confidence can so easily be destroyed by ill-judged comments from a more senior colleague.

This legislative counsel's work will, of course, still be subject to close review by a senior legislative counsel and his or her development will be continually enhanced through the in-house on-going legal education programme.

(5) The Senior Legislative Counsel

Senior legislative counsel have more than 10 years of experience. They are an expert group capable of independently turning out a street-worthy draft in a complex or novel area within tight timelines. They are the power house of a drafting office. They can come up with innovative solutions and apply judgement and experience to complex legislative problems. There is always likely to be lots of work for this group to do. The most important training need in terms of actual drafting is to keep them up to date with developments in the law.

It is this group that plays such an important role in the training and development of junior legislative counsel. To equip them for their training role undertaking a train-the-trainer programme may be useful for senior legislative counsel. It is important that they learn teaching and presentation skills both for one-on-one training as well as for presenting group workshops.

It is vitally important that senior legislative counsel place a high value on passing on knowledge to the next generation of legislative counsel. The open-door policy practised in many drafting offices is indicative of an appreciation of the importance of knowledge transfer. Making junior colleagues feel welcome when they come in to ask you a question or to seek your advice is a valuable skill.

Looking ahead to the next stage senior legislative counsel should be given plenty of opportunities to attend management courses and develop critical higher level management and leadership skills.

(6) The Managing Legislative Counsel

The managing legislative counsel is an experienced senior legislative counsel who is required to manage and supervise colleagues. Being skilled on how to give feedback and get the best out of people is critical. Performance appraisal is another new challenge for the managing legislative counsel. He or she needs to be trained in the details of the performance appraisal system applicable to the office. Having good people-skills is of course vital. It is important to learn how best to make critical comments. So the most needed training at this stage is training in people-management and in general management principles and techniques.

Too often legislative counsel view management training as an unnecessary chore, an unwelcome interruption to their role as a legislative counsel. However, there can be no doubt that a drafting office with leaders unskilled in management is a drafting office running

a high risk of staff discontent and of not delivering the services required of it by government.

(7) The Head of Office Legislative Counsel

And so we come to the head of office, the *primus inter pares* as the role is sometimes described. Ideally the head should be a highly talented legislative counsel with strong leadership skills. He or she needs to be able to multi-task in a complex and fast changing environment. In the course of a day he or she may need to focus on a variety of drafting items, casting a critical final eye on them before they are released into the public arena. He or she may also have to deal with requests for advice on sensitive legal issues and respond to demands by departmental officials for something to be drafted within all too short a timeframe. Along the way there will be a need to attend to general management issues, which may relate to office resourcing, recruitment, succession planning, IT development or a myriad of other matters.

He or she may also wish to continue to personally handle some drafting items and this will greatly add to the need for high level time-management skills.

And of course a head of office should always be thinking about how things might be done better and be open to suggestions for change, whether in how administratively things are handled or in the core drafting techniques being used in the jurisdiction. It's important therefore to know how to manage for change. A head of office also needs to be focussed on the future and on how best to ensure that the office is equipped to deliver its service in the years to come. The head of the office is also the external face of the office and must have the presentation skills to represent that office well within the bureaucracy, to the legislature and generally to the outside world.

So training for an incumbent office head needs to be very much focussed on enhancing leadership, management, presentation and time-management skills. Being trained on how to cope with stress will also come in handy.

Conclusion

Like the Man in Shakespeare's play, a legislative counsel in his or her time plays many parts. His or her training needs differ according to the part being played. Some needs are however constant: such as the need for on-going continuous legal education and the need for training in the use of new technologies.

Providing training places a heavy demand on drafting offices, both monetary and resource-wise. It takes key personnel away from the task of delivering output and thus has an impact on efficiency that must be taken into account in scheduling deliverables. But it is a necessary burden that any drafting office must bear. By not providing appropriate training the office will eventually cease to be able to perform its function with any degree of efficiency or effectiveness.

Training is thus a given. The challenge is to tailor it to the needs of the trainee to ensure that he or she is being given what is needed at the time it is needed. In this paper I have attempted to describe those needs. The timelines I have used in characterising legislative counsel may vary. Some take to drafting like a duck to water and can survive being thrown in at the deep end at an early stage. Such legislative counsel will progress more rapidly through the stages. Others, while still having the capacity to become competent legislative counsel, need a bit more intensive input along the way. Some legislative counsel have no aspiration to take on a management role. They prefer to have the role of a specialist legislative counsel. Such legislative counsel are undoubtedly an important part of any drafting office. For them there is no need to devote time or money to providing them with management skills.

Legislative counsel are by no means homogeneous. You cannot take a one-size-fits-all approach to training within a drafting office. Legislative counsel's training needs vary. But at every stage training of some sort is important. The need is more intensive at the beginning of a drafting career and then it waxes and wanes as they progress and take on new roles and meets new challenges within that career. In my opinion it is taking on new roles and meeting new challenges that makes legislative drafting such a wonderful career choice. Training, therefore, has a key role to play in a successful drafting career.

Book Reviews

Legislative Drafting-An Introduction to Theories and Principles **by Tonye Clinton Jaja published by Wolf Legal Publishers, London: 2012**

Reviewed by Eamonn Moran[1]

Despite the breadth of its title this book has quite a narrow focus. It adopts a definition of effectiveness of legislation attributed to an academic writer, Dr. Helen Xanthaki, and argues that this can best be achieved by adopting a regulatory framework for legislative drafting.

The definition of "effectiveness" adopted from Xanthaki is that the legislation "manages to introduce adequate mechanisms capable of producing the desired regulatory results". Xanthaki sees this definition as applying to the drafting aspect of legislation and that, by achieving it, legislative counsel contribute to the efficacy of legislation (its ability to produce a desired or intended result). The author further adopts Xanthaki's views that efficiency, clarity, precision and unambiguity are tools, below effectiveness in the hierarchy but equal in standing among themselves, that contribute to the effectiveness of legislation with the legislative counsel free to choose in any particular case the best tool to serve the paramount drafting goal of effectiveness. Further down the hierarchy are simplicity and gender-neutral language, which Xanthaki sees as instruments to achieve clarity, precision and unambiguity.

I would have thought it beyond contention that the ultimate goal of legislative counsel is to produce an item of legislation that gives effect to the desired policy. If legislation is not drafted with clarity, precision and without ambiguity, that goal is unlikely to be achieved or may only be achieved after an expensive and time consuming litigation process.

The author argues that the quest for effectiveness inevitably leads to the need for a regulatory framework for drafting legislation. As far as I could discern the author sees that framework as being comprised partly by legislation (particularly interpretation legislation) and partly by non-enacted material such as drafting manuals and directives. The author refers throughout to "Patchett's paradigm" as being the model regulatory framework. This is identified in a footnote on page 4 as a statement made by Keith Patchett, in a specified publication jointly edited by Dr. Xanthaki, that

> common standards and uniform practices for preparing and drafting legislation are set most effectively through the provision of a single set of directives, which have behind them the authority of Government and, as needed Parliament. In the present circumstances of many Central and European countries, the essential elements are most likely to be regulated by law. Not only is this the most powerful means by which reforms can be effected, but for the time being it may be the only sure way by which a single set of standards can be set to bind both Government and the Parliament. Those provisions can be amplified by secondary instruments, such as Standing Orders, made by Government or the Parliament to deal with matters that are of separate concern to them.

[1] Eamonn Moran is currently working as a consultant legislative counsel. He has been the head of the legislative drafting offices in Victoria, Australia (1999-2008) and Hong Kong, China (2008-2012).

This statement would seem to me to be non-controversial.

An important point to make about this book is that, despite the general nature of its title, its focus is very much on Nigeria - its legislation and legislative entities. In particular Nigeria's oil and gas legislation is used as a case study and perceived failings in that legislation are used to justify the proposition that the failings are as a result of a lack of knowledge on the part of Nigeria's legislative counsel of the legislative drafting theory and methods that are the subject of the book.

Unfortunately this book itself has many failings. It is based on work done for a PhD thesis in Legislative Drafting Law. In this regard it even contains material justifying the research methods used in its compilation. The book would have clearly benefited from close editing before publication as it bears many grammatical and typographical errors and is highly repetitious in parts, even on the same page (see page 31). A frequently recurring example of a typographical error is the use of "ambiguity" when "unambiguity" is clearly intended. The headings are printed wholly in capital letters which greatly detracts from their effectiveness and the basic index printed at the back is not accurate. The running headers in Chapter Four identify it as Chapter Three.

I felt that the book is unfairly critical of Nigerian legislative counsel and overemphasises the importance of legislative counsel's awareness of theory and methodology as postulated by certain academic writers as compared with their critical need to be skilled in drafting techniques and aware of the role they play in the legislative system. While I do believe that the in-house apprenticeship method of training legislative counsel needs to be supplemented with a course of formal training (whether conducted externally or in-house), it seemed to me that the book is unfair when at page 41 it describes Nigerian legislative counsel as having "low education and experience" and at page 43 as incompetent merely because they had not attended formal training.

Further, legislative counsel should not be expected to accept responsibility for the policy ultimately reflected in their work and it is unfair to criticise them for any aspect of that policy (for example, the non-availability of judicial review). Nor is any inadequacy in the institutional arrangements within their jurisdiction their fault. It also seems unfair at page 131 for the legislative drafting department at the Nigerian Federal Ministry of Justice to be criticised on the basis that none of the legislative counsel was a qualified economist.

I read nothing in the book that to my mind justified its proposition that the key reason for inadequacy in legislation is over-reliance or total dependence on a legal framework, as opposed to a regulatory framework, for legislative drafting. It seems to me that if a jurisdiction chooses to include within primary legislation, such as an Interpretation Act, rules about the format, content and style of legislation that might otherwise have been included in a drafting manual or other non-legislative text, it has taken a viable option. Whether those rules are legislative or non-legislative will not affect the quality or effectiveness of the legislation produced in that jurisdiction. There is no doubt, though, that, as argued in the book, having detailed style rules in a manual or similar document lends

itself to greater flexibility in amending and updating them and it is an approach that I too would support.

The book gives no detail about what might be included in the regulatory framework recommended for Nigeria. There is a generalised diagram on page 42 which is reflective of the diagram included in an article published by Dr. Xanthaki in the February 2011 issue of *The Loophole* (the Duncan Berry special edition).

Nigeria's *Interpretation Act* of 1964 is heavily criticised at page 76 as being an impediment to effective legislation because it does not "contain provisions on the elements of the definition of effectiveness, such as clarity, precision and unambiguity." Precisely what kind of provisions the author believes that Act should contain is not clear. Its provision about words importing the masculine gender as including females is criticised as a roadblock to gender-neutral drafting. However, there is no acknowledgement of the fact that legislative counsel do not need to rely on such a provision but can draft gender-neutrally in any event.

The book is critical of the Nigerian Constitution for "[not having] concrete provision(s) for undertaking drafting instructions on the one hand and holding Consultations on the other hand" (at page 95) and at pages 128 and 139 for not identifying the bodies responsible for drafting legislation. I would have thought it unusual for a Constitution to identify who is responsible for drafting legislation and to detail the general drafting process to be followed, as opposed to setting out the consultative procedure to be followed if there is a deadlock in the Parliament or with the Executive. I was also startled by the proposition at page 148 that the practice in Nigeria of hiring private legal legislative counsel might be illegal and unconstitutional as the Constitution "does not categorically authorise such sub-delegation of drafting functions by the Attorney-General following the common law rule of non-delegation of a delegated power as expressed in the Latin maxim *delegatus non potest delegare*". In the common law jurisdictions with which I am familiar there is no obstacle to an attorney general or other responsible minister engaging members of the private bar to provide legal services to the government.

I very much agree with the statement at page 123 that one method of achieving consistency in drafting is through the use of uniform drafting rules. However, as a legislative counsel with long experience of working in Australia I was struck by the misunderstanding shown at page 124 where the *Legislation Act 2001* passed by the Australian Capital Territory is cited as being an example of uniform legislative drafting principles being adopted within a federation. That Act only applies to the Australian Capital Territory and not throughout Australia.

The extensive literature review carried out by the author does make the book a useful reference guide to texts about legislative drafting and in focussing on the framework within which drafting is carried out it is a useful addition to the limited number of texts that up to now have dealt with this area.

***Delegated Legislation in Australia*, 4th ed. by Dennis Pearce and Stephen Argument, published by Lexis Nexis Butterworths, Chatswood: 2012**

***Reviewed by John Mark Keyes*[1]**

Delegated legislation is one of the most unjustly neglected subjects to be found in law and government. It does not command the attention accorded primary legislation in public, legal or academic arenas. There are many reasons for this, but in terms of popular attention it has much to do with the spectacle of parliamentary institutions and their domination of headlines when it comes to law-making. Parliamentary affairs are monopolized by primary legislation and delegated legislation comes up far less often in the parry and thrust of debate.

Yet, as those of us who work in the preparation and administration of written law know, the devil is in the detail, and we more often than not have delegated legislation to thank for that detail. Perhaps this expression does indeed explain why so much less attention is paid to it. Who wants to have much to do with the devil?

For the past 35 years, the legal community, and particularly those of us who work on legislative matters, have been blessed to have a notable and invaluable beacon to guide us through the devilry of delegated legislation. In 1977, Dennis Pearce brought this subject into the legal mainstream with the first edition of *Delegated Legislation in Australia and New Zealand*. In 1999, Stephen Argument joined him in publishing the second edition, which concentrated on Australia and has now been followed by the third and fourth editions.

As a student at the University of Ottawa in the early 80s, I discovered the first edition and, simultaneously, a passion for its subject. I also looked in vain for similar works relating to other jurisdictions and found precious little. For the most part, delegated legislation is treated elsewhere as an after-thought of administrative law, including in my own country of Canada. I was inspired to rectify this oversight and have spent much of my career writing and publishing on delegated legislation in the hope that I might be able to equal what Dennis and Stephen have so masterfully done in Australia. Thus, the prospect of a new edition of their book was for me something equivalent to the release of a new Beatles album (which alas will never happen again).

Delegated Legislation in Australia is oriented around two forms of review that may be brought to bear on delegated legislation: parliamentary and judicial. Although each is focused on the same subject, their review criteria are distinctive and of course the remedial aspects of each are altogether different. This attention to both the parliamentary and judicial dimensions is virtually unique in legal writing, which overwhelmingly focuses on the judicial as if it were all that mattered. But the work of legislative counsel is not exclusively of the world of courts. It involves equally, if not more so, the legislative side, which is concerned with both the policy issues that animate legislative business and the legal issues that frame it.

[1] Chief Legislative Counsel, Department of Justice (Canada).

This focus on review -- both parliamentary and judicial -- betrays the central underpinnings of this book: that delegated legislation has to be kept in check; if not, it risks subverting one of its fundamental characteristics: *delegated*. The fundamental checks are the law, as applied through judicial review, and democracy, as articulated through parliamentary review.

For this control to work, and particularly its parliamentary dimension, there must be processes to ensure that delegated legislation is brought to light. This point was noted in England towards the end of the 19th century[2] when the *Rules Publication Act, 1893* was enacted to provide generally for the centralized publication of delegated legislation. It did so by requiring delegated legislation to be "numbered, printed and sold" by the Queen's Printer.

Delegated Legislation in Australia thus logically begins by considering the challenge of categorizing delegated legislation, noting the enduring nature of this challenge into the 21st century in terms of quasi-legislation and the most recent attempts to address it in the Australian Commonwealth *Legislative Instruments Act* (2003). It also draws attention to the importance of carefully considering the merits of delegating legislative powers in the first place and urges a more robust role for parliamentarians in dealing with matters in primary legislation rather than assuming that they should be delegated to others. This is a noble ideal that affirms the role of democratically elected legislative bodies, but whether it can be realized depends very much on how they function in practice and whether they can get past the political issues of the day and in fact deal with the hard business of making laws that will do what they are supposed to do.

Like the previous editions, the 4th edition is organized to make it easy to determine the procedural approaches to delegated legislation in each jurisdiction in Australia. Each is discussed separately, first in relation to requirements for making, publication and commencement of delegated legislation and then in relation to parliamentary review. Other aspects of the delegated legislation, notably scrutiny principles and grounds for judicial review, are dealt with more generically demonstrating the degree to which there is coherence among the approaches taken throughout Australia.

This coherence is also reflected in the now well established Australia-New Zealand Scrutiny of Legislation Conferences, which are described in chapter 11. Their treatment here provides invaluable insight into how matters of delegated legislation can be managed nationally in an inter-jurisdictional forum. These conferences also bring to mind the three Commonwealth Conferences on Delegated Legislation held in the late 70s and early 80s in London, Canberra and Ottawa. Sadly, these conferences have not continued. Perhaps it is time to draw some inspiration from the Australian conferences.

Chapter 11 is also notable for its discussion of a range of topics that point to the future of parliamentary scrutiny, notably the development of uniform or “National Scheme” legislation or scrutiny principles, scrutiny on policy grounds, negotiated regulation-making and assessing the effectiveness of scrutiny committees. It is yet another example of the dynamic nature of *Delegated Legislation in Australia*: the world does not stand still and the

[2] C. Carr, *Delegated Legislation* (Cambridge University Press, Cambridge: 1921) at 44.

authors have done well to foreshadow things to come in addition to describing how they have been and are at present.

A significant new feature of the 4th edition is chapter 10 on human rights scrutiny. It focuses on three jurisdictions that now provide for this scrutiny by parliamentary committees (Commonwealth, Australian Capital Territory and Victoria). Given how recently this scrutiny has been instituted, there is little comment on committee practice apart from a summary of concerns raised by the Victorian committee in its 2009 and 2011 reports. The authors note, however, that "there is already an impressive history of legislative scrutiny, in all jurisdictions, in relation to issues that include core human rights issues." The same can be said of judicial review as well, and indeed human rights issues in this context are discussed later in chapter 19 on repugnancy (19.3 - constitutional limitations and 19.5 - human rights and repugnancy). However, given the developing significance of human rights issues in Australia, particularly in light of human rights charters recently enacted in the Commonwealth, the Australian Capital Territory and Victoria, there may well be a need in the coming years to highlight this aspect of judicial review in a separate chapter, as the authors have done for parliamentary review in chapter 10.

The authors note in the preface to this edition that judicial review has not seen any great change in principle since their 3rd edition. However, there has been a steady stream of new cases since then, which the 4th edition carefully notes up to June 30, 2012.

Delegated Legislation in Australia is not only a fine piece of scholarship and an invaluable resource for legislative counsel, it also highlights how the Australian legal system at the Commonwealth, state and territorial levels balances the need to delegate legislative powers to extra-parliamentary bodies against the need to supervise and control those bodies in both legal and parliamentary terms. This book is thus the product of the very system it describes and underscores an interest in these matters that transcends the academic and legal worlds, reaching into parliamentary life as well. This is an enviable state in every sense of the word. Thus, perhaps the highest commendation of *Delegated Legislation in Australia* is that it provides inspiration by demonstrating what can be done to ensure that delegated legislation serves the public good.