CALC Newsletter

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In this issue—

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Sir Thomas Erskine May, KCB, "Parliamentary Practice" (5 May 1871) *Vanity Fair* 176

CALC President's Report—February 2017

President
Commonwealth Association of Legislative Counsel

CALC Conference and workshop—Melbourne and Sydney

1 We are putting the final touches on the organisation of the CALC Conference in Melbourne and the associated CALC Workshop in Sydney. Details of the programs are available on the CALC website.

2 This looks like being a great event with over 200 delegates registered for the conference and 100 also attending the workshop. Registrations have now closed.

3 The conference is being sponsored by Leidos, LexisNexis and Irosoft. We appreciate their generous support for the conference.



Proposal for constitutional change

4 Notice has now been given of the proposal for constitutional change that was foreshadowed in the last *CALC Newsletter*. The change would allow the CALC Council to make provision for electronic voting in the future.

Nominations for positions

5 At the CALC General Meeting there will be an election for all of the CALC Council positions. Nominations will close 5pm Australian EDT Wednesday 15 March 2017.

6 Some nominations have been received and these can be seen in the Members' Area of the CALC webpage under 2017 Election of Officers. You need to be logged on to view this page.

Working group on insurance needs

7 As you would recall, the CALC Council set up a number of working groups to look at matters of interest to CALC members. The final one of the working groups to report was looking at insurance for drafters undertaking contract drafting work.

8 The outcomes of the working group are reported elsewhere in this edition.

9 The working group found it quite difficult to get information about the arrangements that people entered into to arrange this insurance. If any CALC members have information that they would like to share, they should send it through and the new Council will be able to consider the matter further.

10 I would like to thank Adrian Hogarth and Theresa Johnson who were the CALC Council members who were involved in this working group.

Standing down as President

11 I will be standing down as CALC President at the CALC Conference.

12 I have been President for 3 terms, a total of 6 years, and think that it is a good time for someone else to take on the role.

13 Many of the achievements of CALC during the time that I have been President have been building upon the work of earlier CALC Councils and on suggestions made by CALC members. I believe that CALC is even stronger now that it has been at any time in the past and that it has a very positive future.

14 Some of the highlights for me over the past 6 years are:

- 2 very successful CALC conferences (plus one Asian region conference) and the upcoming Melbourne conference:
- an increase in CALC membership to around 1,800 members:
- CALC having a very strong financial position:

- increased involvement with the Commonwealth and the Commonwealth Secretariat:
- CALC's new webpage:
- continuation of the regular publication of *The Loophole* and the *CALC Newsletter*:
- completion and implementation of a number of working group reports.

15 I have very much enjoyed working with the CALC Council members over this time and thank them all for their contribution.

16 I have also enjoyed the contact that I have had with CALC members from across the world during my time as President.

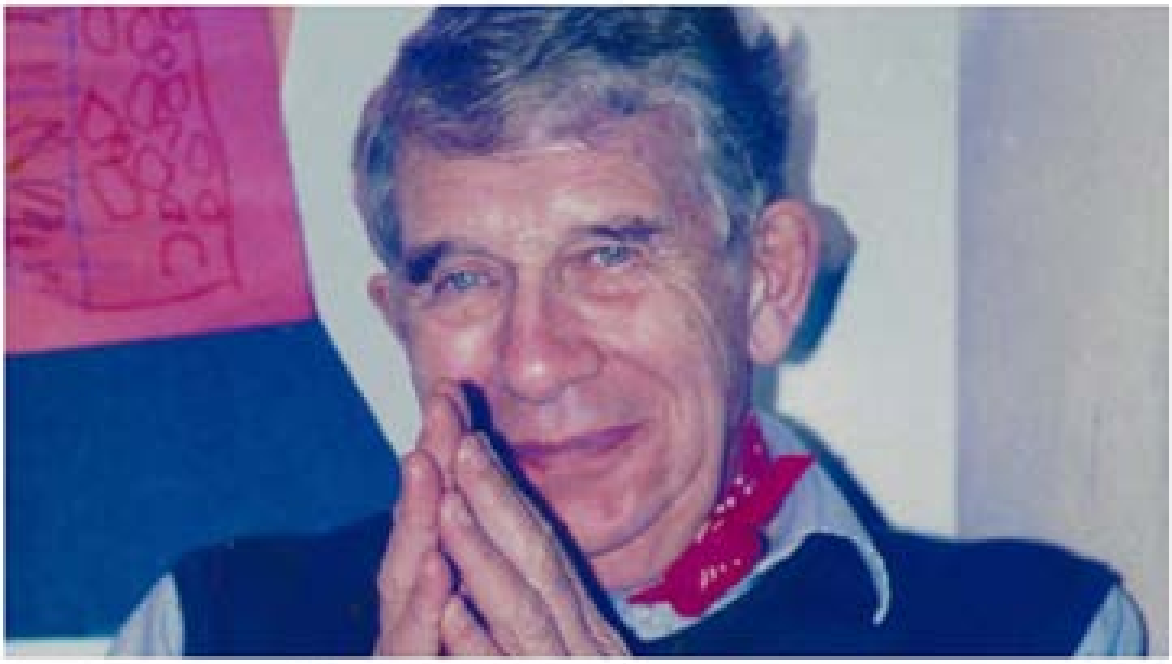
Peter Quiggin PSM

CALC President

February 2017

Obituary: Sir George Engle, KCB, MA, QC

A founder of CALC, and its first President, died September 2016



George Engle in wry mood in 1986

A founder of CALC, and its first President, died in 2016. Sir George Engle, KCB, MA, QC was born on 13 September 1926, and died in (on 14 or 15) September 2016, aged 90 years.

An obituary was composed by *The Times*, after consulting at least one of Sir George's daughters, George's friend Sir Geoffrey Bowman KCB, QC (also a former UK First Parliamentary Counsel), and maybe other people. This item quotes from, and acknowledges with gratitude, this source.

The obituary notes Sir George's warmth and humour, and encyclopaedic grasp of world affairs. His love of books is said to be shown by his enormous library: "When embarking on the family's annual holiday in France, his first act of preparation was to line the floor of the car with books." The obituary continues:

> "In the days before Google," recalled his friend Sir Geoffrey Bowman, "George was a walking encyclopaedia on everything from Aardvark to Zoroastrianism. And if he did not know something immediately, he would ascend the steps in his library and pluck out the book containing the answer."

> All this ready knowledge stood him in good stead when drafting legislation, a specialisation that requires a keen eye for detail, intellectual energy, and the ability to make it comprehensible, not just to the politicians enacting it, but to the wider public as well. Engle encompassed all of this, but he also understood that the way laws are written is an evolving process.

The obituary composed by *The Times* also says the following about drafting in the 1980s, and about Sir George's attitude to its transformation and his support for young people and reform:

> During the period when he was first parliamentary counsel in the 1980s, the traditional approach, whereby legislation was framed in what one lawyer described as "slabs of prose", was being modernised. The emphasis was on shorter sentences, sharper definitions, and more accessible writing. Though Engle himself was not by instinct a pioneer, he understood the need for this transformation, and greatly encouraged it. Clever, conscientious, reliable, and painstakingly accurate himself, he was always ready to support young people, to build their self-confidence and to speed reform.

Sir George's encouraging debate, and the sharing of ideas, about how legislation is prepared and enacted, and his helping to create CALC, are recorded by the obituary as follows:

> Engle had always believed that the preparation of legislation should not be an arcane mystery, understood only by a few, but rather took the view that an understanding of Acts of Parliament is helped by an understanding of the way they come into being. He therefore encouraged debate about the subject, and succeeded in persuading at least some of the critics of legislation that its defects were not exclusively attributable to the handicaps of those who drafted it. He helped to create the Commonwealth Association of Legislative Counsel, which has proved to be a valuable forum for the sharing of ideas among drafters.

The obituary composed by *The Times* refers as follows to Sir George's work in Nigeria, and then as a drafter of some of Britain's key post-war legislation:

> Seconded to Nigeria in the 1960s, he drafted much of that country's early legislation, and was later involved in drafting some of Britain's key postwar legislation, including the Misuse of Drugs Act 1971, the Health and Safety at Work Act 1974, the Oil Taxation Act 1975 and the Supreme Court Act 1981.

The obituary notes that, after obtaining a double first at Oxford, where he read mods and greats (at Christ Church), Sir George considered pursuing a career as an academic philosopher, but changed direction and read for the bar. It says "He was called in 1953 and, after a pupillage with George Rink, joined GD Johnson's chambers." The obituary composed by *The Times* continues:

> Work at the Chancery Bar was slow in coming and early in 1957 Engle accepted an offer from Sir Noel Hutton to join the Office of Parliamentary Counsel, which drafts government Bills and tends them as they move through Parliament. For the next few years Engle was learning the trade. He spent most of this period assisting the senior members of the office, including the formidable Sir John Fiennes, QC; but he was given primary responsibility for the occasional Private Member's Bill. The one that he liked to remember particularly was Bessie Braddock's Bill for the Public Lavatories (Turnstiles) Act 1963, which required local authorities to remove turnstiles from public conveniences within six months of the passing of the Act — a considerable relief to the general public.
>
> In 1956 he married Irene Lachtmann from Berlin, who was, like him, Jewish, and whose family had fled Germany in 1938. They had three daughters, the eldest of whom, Eleanor, is an artist; the second, Cecily, is a lawyer and family therapist; and the third, Vanessa, makes documentary films for the BBC.
>
> After eight years in London, Engle was seconded to Nigeria, and took his family with him. During his time there a coup resulted in the replacement of the elected government with a military regime. The need for the careful preparation of laws remained, and at the request of the new government Engle completed a second year, drafting decrees in place of parliamentary Bills. Soon, however, he found himself being required to draw up increasingly repressive laws, and he returned to London in 1967.

After Sir George and his family returned to London, the obituary composed by *The Times* says:

> An intense period of legislative drafting followed, during which he was involved in drawing up major acts that continue to influence public life today. While he was enthusiastic about laws governing drugs or health and safety, he was less enthusiastic about tax legislation. From 1971 he spent two years on secondment to the Law Commission. Despite the fact that his work on a project to codify the law of contract came to nothing, he enjoyed his time at the commission and in particular appreciated the advantages of the more measured pace of work there.
>
> In 1981 he was promoted to be first parliamentary counsel, working with lawyers whose remit was to liaise with ministerial departments to translate policy into clear, effective and readable law. He took silk in 1983, was knighted later in the same year and in 1984 was appointed a Bencher of Lincoln's Inn, with which he maintained a close connection. Upon his retirement in 1986, he continued to take an interest in legislative matters as a member of the Hansard Society's commission on the legislative process.

The obituary composed by *The Times* appeared in *The Times* of 24 September 2016:
http://www.thetimes.co.uk/article/sir-george-engle-2vwmzr8tm

Irene's maiden name was Lachmann (not Lachtmann), and a comment on that page also says a reference in that obituary to another close friend of Sir George's is one to the musician and humorist Gerard (not Gerald) Hoffnung.

The reference to the Health and Safety at Work Act 1974 is to the Health and Safety at Work etc. Act 1974 (1974 c. 37). Sir George was apparently always proud of the accuracy of the "etc." in the Act's title, since the Act covered a wide range of things!

Health and Safety at Work etc. Act 1974

1974 CHAPTER 37

For alerting CALC to Sir George's death, thanks must go to another founder and past President of CALC, Walter Iles CMG, QC. This certainly helped ensure that CALC recognises properly Sir George's significant contribution to the establishment and development of CALC.

CALC's President, Peter Quiggin PSM, on 13 December 2016 emailed CALC members saying:

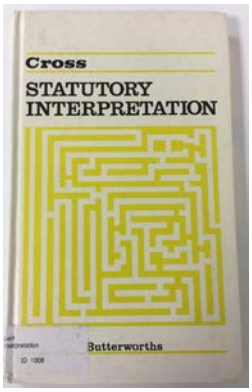
> Sir George Engle made a significant contribution to the establishment and development of The Commonwealth Association of Legislative Counsel. He assisted in the drafting of its constitution and was both one of its founding members and its first President.
>
> On behalf of CALC, I extend my sympathies to his family.
>
> A condolence book has been set up at *The Times* online site:
> http://www.legacy.com/guestbooks/timesonline-uk/george-engle-condolences/181452954

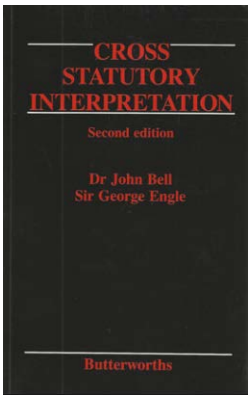
On Sir George's role in CALC's establishment (in 1983), *see* Sir George's "Retrospectively: the formation and subsequent progress of the Commonwealth Association of Legislative Counsel" (Sept. 1987) 2.1 *The Loophole* 19, and Walter Iles QC's "Short History of the Commonwealth Association of Legislative Counsel" (2011 Issue No 1) *The Loophole* 10.

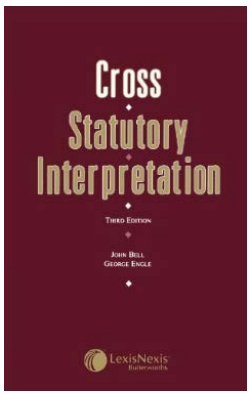
Sir George's other published writing about legislative drafting and parliamentary counsel includes the following:

- "'Bills are made to pass as razors are made to sell': practical constraints in the preparation of legislation" (1983) 4(2) Stat LR 7:
- "The Legislative Process Today" (1987) 8(2) Stat LR 71; (1987) 2.1 *The Loophole* 78:
- 'Statutes in Force: the United Kingdom's official revised edition of the statutes' (Sept. 1987) 2.1 *The Loophole* 81:
- "The Rise of the Parliamentary Counsel" (1996) 16(1) Parliament, Estates and Representation 193.

Sir George Engle, KCB, MA, QC also edited (in 1987, and in 1995, with John Bell, Professor of Public and Comparative Law at the University of Leeds from 1989–2001) 2 editions of the famous book by Sir Rupert Cross (discussed here and here) on *Statutory Interpretation* (1976).







George's involvement in the second and third editions of Cross arose as a result of his correspondence with Sir Rupert Cross in relation to the first edition in 1976. His "remarks" and "corrigenda" covered nine typed pages! Cross was appreciative and wrote "I am preserving your every word and will make full use of them should a reprint or second edition ever be called for." (letter 13 July 1976). Alas, Cross died before a second edition was possible, so George proposed a second edition in 1984 and his friend, Guenter Treitel, enlisted Dr John Bell to assist. Whilst Bell undertook to research the more academic works and some cases, George subjected judicial pronouncements to meticulous scrutiny and tried to ensure that the presentation of the legislative process fitted the realities which he knew better than most others. He retained many friendly contacts with judges on these matters. In preparing the third edition in 1994, he wrote that he had been in conversation with Steyn LJ (as he then was) and now considered that the editors should "include something on the presumption in favour of a construction in accord with the European Convention on Human Rights…this has a considerable effect nowadays". This was, of course, before the Human Rights Act 1998 was envisaged.

George was a modest man. When awarded his knighthood, Rupert Cross wrote to congratulate him. George wrote back "You shouldn't have bothered to write about the gong, which in my case is purely the rate for the job and not, as in yours, a recognition of a real contribution beyond the call of duty. My kids spent the first weekend addressing me as Crumb Bun (and Irene as the Wife of Bath)." (letter of 20 July 1976)

Sir George was very knowledgeable about the works of Rudyard Kipling. According to the Oxford Today—Obituaries 2016, he was President of the Kipling Society from 2001 to 2008. Sir George contributed a number of papers to The Kipling Journal. An obituary for Sir George also appears in the December 2016 issue of The Kipling Journal: (December 2016) Volume 90 number 366 The Kipling Journal at page 9.

CALC's condolences have been passed on to Lady Engle—by Elizabeth Gardiner CB, First Parliamentary Counsel, OPC, London. Elizabeth indicated that CALC remains an organisation close to the hearts of the drafters of OPC, London, who remain represented (by Adrian Hogarth, and through his service) on CALC's Council.

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Hierarchy of norms in Rwanda

Patrick Kamugisha, Legal Awareness Specialist,
Rwanda Law Reform Commission

a. Introduction: Rwanda and its legal system

Rwanda is a sovereign state in central and East Africa. It is one of the smallest countries on the African mainland. Kigali is its Capital and largest city. The official languages are Kinyarwanda, French, English, and Kiswahili. The medium of instruction at school is English (rather than French, which was used in the past). It got its independence from the Belgians on 1 July 1962. Rwanda joined the Commonwealth in November 2009.

Rwanda's legal system is mainly a civil law one. But today, the tendency is changing, because it is borrowing some common law. As well, the civil and common law legal systems combine with the traditional system. Rwanda's system is thus a hybrid of both local and imported systems.

The Legislature is made up of both upper and the lower chambers (Deputies and Senators). The Government is semi-Presidential.

b. Hierarchy of Norms in Rwanda

Hierarchy of norms is a theory that is commonly used here in Rwanda as well as in Hans Kelsen's book the *Pure Theory of Law*. Hans Kelsen's theory of positive law involves a hierarchy of laws – which start from a Basic Norm (or, Grundnorm) – where all other norms are related to each other by either being inferior norms, when the one is compared to the other, or superior norms.

Therefore, a law cannot contradict another law that is higher in the hierarchy.

I. The Constitution

It is the main source of Rwandan Public Law. In a material sense, it is a set of rules either written or of custom which determines the shape of the State. In a formal sense, it is a document organizing political institutions, the legislative drafting and required quorums in order for a law to pass (constituent assembly, qualified majority, etc), joint parliamentary commissions, how the top leaders are put in place, their mandates, and so forth.

The constitution is the supreme Law in Rwanda. Rwanda has known 6 constitutions:

- The constitution of 1961
- The constitution of 1962
- The constitution of 1978
- The constitution of 1991
- The fundamental law putting together the constitution of 1991, The Arusha Peace agreement of 4/8/1993, FPR declaration of 17/7/1994 on the establishment of public institutions and the agreement protocol between FPR, MDR, PDC, PDI, PL, PSD, PSR and UDPR on the establishment of national institutions.
- The Constitution of 2003

Shortly after the 1994 Genocide against the Tutsi, Rwanda in the aftermath of the Genocide had no Constitution; instead we had "fundamental laws". These laws were the supreme ones until the new Constitution was voted through a referendum and published in the official gazette of

the Republic of Rwanda on 4 June 2003. This 2003 Constitution has, for important reasons, been amended four times. The first amendment was published on 2 December 2003, the second on 8 December 2005, the third on 13 August 2008, and the fourth on 17 June 2010.

- The revised Constitution of 2015.

On 18 December 2015, Rwandans through a referendum voted for another amendment, and it was published in the official gazette on 24 December 2015.

II. Organic Laws

Organic laws are the ones that come after the Constitution. Before the 2015 amendment of the current Constitution, the hierarchy was instead that International instruments ratified by Rwanda came after the Constitution. This is one of the major changes made in that amendment.

Organic laws are only those laws that are recognized by the Constitution as Organic laws. There are ten (10) of them. That means that no other Organic law may be passed by the Parliament unless it is provided for by the Constitution. For Organic laws to be passed, they require a three fifths (3/5) majority vote of Deputies or Senators present entitled to vote.

III. International treaties and agreements ratified by Rwanda

As stated in the paragraph above, these had the second position in hierarchy of norms but, with the new 2015 constitution, they now come third. Organic laws were elevated in the hierarchy, and nearly equated in position with the constitution. This change aimed to achieve stability, and to minimize required amendments to the Constitution due to the many international obligations taken on by the State. So the 2015 constitution devolved many of powers formerly to be found in the constitution to the Organic laws. Therefore many international instruments which used to affect the constitution will now affect instead the Organic laws (because they have a more flexible amendment process than that for the constitution). Therefore, before Rwanda ratifies a treaty, it checks whether the treaty conflicts with either the Constitution or the Organic laws.

IV. Ordinary laws

These laws come after the international treaties or agreements ratified by Rwanda. These laws are many in number. They are put in place depending on the need and the social problem that requires a law to govern that particular area. In the Rwandan system a law may be initiated by the Government or by a Parliamentarian. Ordinary laws are passed by an absolute majority of the parliamentarians.

V. Orders

Orders are items of secondary legislation that implement items of primary legislation. No order may be validly put in place that is not provided for by the primary statutes. These orders are either Presidential, Prime Ministerial, or Ministerial. The orders do not require passing through the Parliament. Instead, once they have been adopted by the Cabinet, the organs that are in charge of issuing them ensure that they are gazetted for immediate use.

Presidential orders must be countersigned by the Prime Minister, Ministers, Ministers of State and other members of the Government who are responsible for their implementation.

VI. Instructions and bylaws

These are issued by local councils and authorities when exercising their mandates.
They must not contradict higher norms and the Constitution. There are a number of them, because the local councils issue them often.

V. Unwritten customary law

The Constitution also recognizes, as a source of law, unwritten customary law, provided that it does not conflict with the written laws.

c. Conclusion

This, in outline, is how the laws are made and applied according to their hierarchy in conjunction with the principles of law. No law can contradict one in a higher position.

Patrick Kamugisha, C/O Rwanda Law Reform Commission
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RWANDA LAW REFORM COMMISSION

RLRC

Law reform for a predictable and dynamic legal landscape

Draft report of working group on insurance needs

Some time ago, Eamonn Moran and Duncan Berry put forward a number of proposals to the CALC Council to support drafting offices in less developed Commonwealth countries. Since then, the CALC Council has been working on these proposals.

A number have been completed and implemented. These include the CALC online drafting advice service and the office organisation advice service. Details of these were included in the March 2016 *CALC Newsletter*. There is also detailed information on the CALC Website (calc.ngo).

Another suggestion was to investigate the provision of insurance cover. This strand of work involved setting up a working party "To investigate the provision of insurance cover to be provided to CALC members providing assistance that is organised through CALC". That refers to members providing advice or assistance under the experimental arrangements relating to drafting office organisation and the provision of online drafting advice.

The working party was 2 Council members, Adrian Hogarth and Theresa Johnson. They prepared an excellent draft report. However, they considered the evidence base for that draft report more limited than they would have wished. They said that they would very much welcome input from other Council members (and, indeed, other CALC members) before finalising the report.

CALC's Council noted that this work and report turned out to be more difficult than had been expected. It was supposed, before the work began, and the draft report became available, that there would be more information available than there is on what people do about insurance.
CALC's Council thus agreed with the Working Group's recommendations that its draft report should be treated as provisional, and should be provided to all CALC members for comment.

This edition therefore sets out the draft report for members' consideration and comments.
Any comments you wish to make on it should be made before 1 May 2017 (if possible) and by email to adrian.hogarth@cabinetoffice.gov.uk and to theresajohnson@doj.gov.hk.

Draft report prepared by CALC Council Working Group in January 2017

Preliminary report to CALC Council after investigating the possible insurance needs of CALC members providing assistance organised through CALC schemes

Overview

1. CALC has established arrangements designed to facilitate the provision by CALC members ("members") of:
    a. on-line advice to other drafters on drafting problems, and
    b. advice on the organisation of drafting offices

2. Both forms of assistance are provided free of charge and CALC expressly states that no liability attaches to the advice given in the course of providing assistance under the arrangements CALC has put in place. However, it has been considered prudent to investigate whether it is necessary and possible to obtain appropriate professional indemnity insurance. The incidental issues of travel insurance and public liability insurance have also been considered.

3. The contractual and legislative framework and common law rights and obligations between a member and the entity seeking assistance will vary from jurisdiction to jurisdiction. The risks arising (if any) will also vary from jurisdiction to jurisdiction.

   For this reason, any guidance given is necessarily general and subject to the need to consider all case-specific factors, including the applicable laws.

4. This report does not cover the provision of advice or drafting services other than advice given under the arrangements referred to above. Members providing services in other circumstances (and whether or not on a remunerated basis) are of course well advised to consider carefully the terms on which the work is undertaken, the legal or other risks that arise and whether insurance cover is sensible. Members must of course comply with any applicable legal or professional insurance obligations.

Travel Insurance

5. The position is simple enough for travel insurance relating to any travel required in connection with providing advice on the organisation of a drafting office.

   If the member travels to another jurisdiction to provide assistance, it is essential to consider whether there will be appropriate medical/ accident/emergency insurance in place for the duration of the trip and, depending on the destination, additional insurance against other risks.

6. Insurers are likely to regard the travel as being for business purposes (even though the member is not being paid), so care must be taken to ensure that any policy relied on does provide cover. Some general travel polices do cover some business activity, for example office-based work, but the scope of any cover provided may need to be confirmed with the insurer.

7. It would be appropriate for the jurisdiction receiving the assistance to arrange (or at least to pay for) suitable travel insurance. Similarly, if assistance were being provided for a Commonwealth project, it would often be appropriate for the Commonwealth Secretariat to arrange or provide insurance. This second option may be particularly useful for higher risk destinations, and there is a scheme under which the Commonwealth provides cover for persons travelling to certain destinations on Commonwealth projects.

8. Some members may have cover (for example, for medical expenses) as part of schemes operated by their employer. Others may have annual travel policies. Again, it is important to be sure that such cover would cover the travel in question and that it is adequate.

9. If for some reason adequate insurance is not forthcoming through any of these avenues, members are strongly advised to consider obtaining their own personal travel insurance which, except for high risk destinations, is likely to be relatively inexpensive.

10. Ultimately, if the travel insurance issue cannot be resolved, a member may decide that it is better to offer only whatever assistance he/she can provide remotely and not to travel to the jurisdiction seeking assistance.

Public liability insurance

11. Legal or professional requirements about public liability insurance vary from jurisdiction to jurisdiction and some governments require contractors to have public liability insurance. We think it is unlikely that such requirements would apply to the kinds of assistance covered by this report, but if they do apply, they must be complied with.

    It may be possible to agree with the jurisdiction concerned that the nature of the assistance is such that any requirements normally imposed as part of normal public procurement processes should be waived.

12. If there is no duty to have this insurance, it is difficult to envisage why a member providing either type of pro bono assistance would actually require public liability insurance in relation to the provision of mere advice.

13. It may be that a member travelling for the purposes of giving advice could incur liabilities to third parties while abroad. But the more significant risks might well be covered by any normal travel insurance policy.

14. Although we have not found it easy to identify what is in fact covered by this insurance that could be relevant to the member, we understand from one or two members providing freelance drafting services who do have professional insurance cover that the “public liability” element of the policy premium is modest.

Professional liability insurance

15. We have not been able to identify any appropriate existing generic insurance product. We also doubt if there would be much interest from insurers in developing one to provide professional indemnity cover for members providing either type of assistance (or indeed freelance drafting services generally). The demand for such cover will be low at best, and insurers will have difficulty understanding the nature of the work and quantifying any attendant risks.

16. If members wish to obtain cover they will need to approach suitable insurers to see what can be made available. The chances are that any policy on offer will have been developed for more general purposes or indeed for another purpose altogether. So members would need to consider the terms carefully in case they are inappropriate for the nature of the assistance being given.

17. It is also possible that, in the absence of any claims experience, an insurer would regard any risks as more significant than they really are. Other forms of consultancy, and especially paid consultancies, may well carry greater legal risks, for example for consequential losses if the consultant is negligent. But in these cases the insurers will have more claims experience and so will be a better position to quantify and price the risks.

18. For full professional liability insurance for a freelance drafter, we are aware of annual premiums in the UK of around £2000 per year. That seems quite high compared with premiums for other kinds of professional insurance – but those other premiums are likely to reflect a greater claims experience.[1]

19. In some jurisdictions freelance drafters' professional activities may be treated as work to which professional regulation applies, including in some cases insurance obligations. It seems unlikely that that would apply to pro bono activity of the kind covered by this report, but it is for individual members to consider what, if any, professional rules apply to them when carrying it out.

1. It appears that only a small percentage of freelance counsel have this cover (which would probably include public liability cover), and usually they have it only because they are expected or required to have such cover by their main (public sector) clients. It may be more important for freelance drafters to ensure that their contracts exclude or are at least realistic in terms of any duty of care or liability for consequential losses. We are aware that some jurisdictions will treat freelance drafters on the same basis they would treat their own employees and individuals may be able to negotiate a "no liability" clause in any contract for services.

Potential professional liability risks for members providing on-line drafting assistance

20. The risks attaching to the provision of on-line advice on drafting problems or the provision of advice on office organization were considered.

21. It may be that in theory there would be some sort of duty of care, but we wonder how likely that is in the circumstances of the CALC arrangements (and especially the on-line drafting advice scheme). In particular, we doubt if there is any intention to create legal relations sufficient to create a contract. We also suspect that, for the same reasons, a court would either conclude there was no tortious duty of care or set a high threshold for establishing a breach. But even if we are wrong on that, the actual legal risks involved for those working under the two schemes may well be modest at worst.

22. We think the legal risks involved in giving off-the-cuff advice and assistance on drafting problems are virtually non-existent given the nature of the drafter's task (to give effect to instructions, good or bad) and the input from others involved in drafting, checking, approving and enacting a draft.

    The member giving assistance is not, in our view, carrying out any substantive drafting work but simply trying to help the drafter who is doing the job in the jurisdiction concerned. The responsibility seems to us to remain with that drafter and others involved in that jurisdiction.

    In addition of course, anyone seeking to sue would need to prove a breach of the duty of care, foreseeable loss and causation. Indeed, we are unaware of any occasion on which a drafter has been sued for professional negligence and note that most individual freelance drafters operate without professional indemnity insurance.

Potential professional liability risks for members providing organisational assistance

23. Looking at the risks attaching to the provision of advice on the organisation of drafting offices, it was also difficult to identify any significant risks except perhaps if the advice involved specific recommendations in circumstances where the "client" might reasonably expect to rely on the member's expertise. For example, recommendations about IT products or contractors, which subsequently failed or proved problematic, might cause trouble.

24. But for any of this to matter in practice assumes our general view as to the nature of the exercise being undertaken (see paras 21 & 22) is wrong. Also, we doubt whether under CALC's pro bono schemes the member would be making such specific recommendations in circumstances that make it reasonable for the client to rely on it being given under a legal duty of care. Rather, recommendations would be made on the explicit basis that they are mere suggestions with the decisions and responsibility lying elsewhere. If a jurisdiction wants more, they should negotiate a contract and proper terms of reference and pay a consultant.

25. If a member assessed that there was the possibility of risk attaching to the provision of particular advice on the organisation of a drafting office, we would recommend that the member negotiate a written agreement with the jurisdiction that requested assistance about the basis on which the advice is provided and ensure the agreement includes a no-liability and indemnity clause. And the insurance position would need to be considered carefully.

26. Generally, any disclaimer of liability on the part of CALC and the member needs to be sufficiently robust and prominent to eliminate or reduce any risks as far as possible. In some jurisdictions an effective wording may need to reflect the fact that some risks cannot be excluded or can only be excluded to the extent that is reasonable in all the circumstances.

The next steps

27. In summary, except in the limited case mentioned in para 23, it is difficult to see how the provision of assistance of either kind carries any significant risks of liability for negligence and consequential loss. There are also no suitable insurance products readily available for professional indemnity and public liability risks attaching to the assistance this report relates to.

28. We think the uncertainty around those issues makes it important for any disclaimer of liability on the part of both CALC and the member offering the pro bono assistance to be as prominent and explicit as it can be. We recommend that the wording used (whether on the CALC website, in any other CALC documentation or in any agreement relating to particular assistance) is reviewed.

    We think that the absence of remuneration means that an exclusion (to the extent permitted by law) is reasonable. Some jurisdictions may limit or exclude the right to exclude liability for some things such as personal injury. However, we are not aware of any jurisdiction limiting or excluding the right to exclude liability for professional negligence.

29. Accordingly, the working group recommends that the insurance situation be kept under review and another investigation of insurance needs and products be undertaken to report no later than January 2020. We recommend also that the working group continues in existence – although its membership may need to be refreshed. There might be a case for including a CALC member (not necessarily a Council member) with direct experience of these issues in relation to freelance work.

30. It may be that some members have relevant information or experience that could be shared with the working group. We should invite members to do that. Any invitation should extend to information about similar issues affecting freelance drafters more generally. While this report is not intended to cover insurance and liability issues affecting paid freelance work, the same issues arise and freelancers' experiences may well be of interest in the narrower context of the guidance in this report.

15 January 2017
CALC working group
Adrian Hogarth and Theresa Johnson

Items of Interest

Victoria, Australia: new Chief Parliamentary Counsel, Marina Farnan



On 29 November 2016, Chris Eccles, Secretary of the Department of Premier & Cabinet Victoria, made this announcement:

> I am pleased to advise you that Marina Farnan has been appointed Chief Parliamentary Counsel. Marina joins DPC from the Commonwealth Office of Parliamentary Counsel.
>
> Marina commenced her career in the Australian Public Service in 1986 as a graduate, before moving to the Department of the Prime Minister and Cabinet. Marina worked in various legal and policy roles before joining the Commonwealth Office of Parliamentary Counsel in 1993. She was appointed Second Parliamentary Counsel 11 years ago and is in her second term.
>
> Marina holds a Bachelor of Arts and a Bachelor of Laws (Honours) from the Australian National University and was admitted to the NSW Bar in 1989. Marina has particular drafting experience in constitutional, administrative, maritime, workplace relations and health and disability law and has delivered papers to numerous national and international drafting conferences.
>
> I would also like to take this opportunity to thank Jayne Atkins who has acted so capably as a steward for the Office of the Chief Parliamentary Counsel for the past 5 months. Thanks to Jayne's leadership of the office and management of a busy legislative program, Marina is inheriting an outstanding organisation that stands ready to deliver on the new year's challenges.
>
> Marina will commence with DPC on 18 January 2017, with Jayne continuing as Acting Chief Parliamentary Counsel until that time.
>
> Please join me in thanking Jayne and welcoming Marina to DPC.

Mrs Gemma Cecilia Varley, PSM, was Chief Parliamentary Counsel for Victoria from 2008 until 2016. Gemma is now in private practice as a Consulting legislative drafter. She was in August 2016 appointed a Commissioner at the Victorian Law Reform Commission.

New Zealand: giving and serving notices – Solicitor-General's reference No 1 of 2016 – NZSC has given leave to appeal

As the last edition noted, New Zealand's Court of Appeal in 2016 (upholding the High Court) held that a notice *not* given by the duty holder or by a delegate (who may serve a notice duly given) is a nullity: *Solicitor-General's Reference (No 1 of 2016)* [2016] NZCA 417.

New Zealand's Supreme Court on 19 December 2016 gave leave to appeal: [2016] NZSC 168.

United Kingdom: Judges pension change unlawful age discrimination

Over 200 UK judges won recently a landmark ruling that the Lord Chancellor and the Secretary of State for Justice discriminated unlawfully against them by making changes to their pensions based on age. The Public Service Pensions Act 2013 (UK) s 18(1) involves mandatory closing of an existing pension scheme, as part of transfer to a new and less favourable one. Exceptions to s 18(1) are set out in transitional provisions in Part 2 of Schedule 2 of the Judicial Pensions Regulations 2015. But the exceptions – either "full protection" or "tapered protection" exceptions – are based essentially on judges' ages. In the London Central Employment Tribunal, Employment Judge Williams held that, through the regulations, the respondents have treated and continue to treat the claimants less favourably than their comparators because of their age. Judge Williams also held that the respondents have failed to show their treatment of the claimants to be a proportionate means of achieving a legitimate aim. The Equality Act 2010 (UK) implements the Employment Equality Framework Directive 2000/78/EC, and the Act's statutory authorisation exception (see s 191 and Schedule 22 of that 2010 Act) applies only if the discrimination occurs due to a requirement of (so not use of a discretion in) an enactment. A report says the Ministry of Justice is disappointed, and will consider appealing the judgment.

United Kingdom: "Brexit" – Act held to limit foreign affairs prerogative

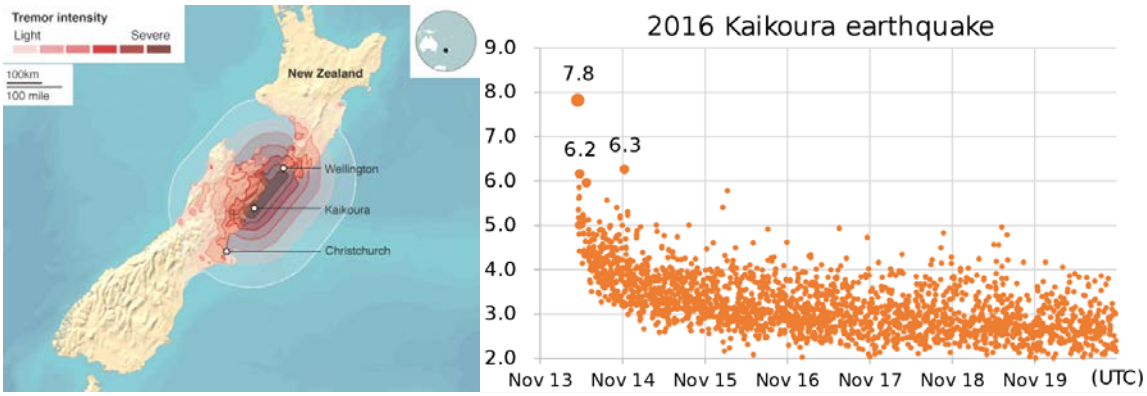
Legislation implementing international legal obligations, and how it does or may affect the foreign affairs or treaty-making Royal prerogative, were at issue in the 2016 EWHC ruling on the European Communities Act 1972 (UK) and Article 50 of the TEU - *R (Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), an appeal against which by the Government was heard by the UKSC, sitting with 11 Justices, from 5-8 December 2016.

The UKSC gave judgment on 24 January 2017, upholding (by an 8-3 majority) the EWHC decision: *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5.

The European Union (Notification of Withdrawal) Bill 2016-17 was therefore published, and read a first time in the House of Commons, on 26 January 2017. The Bill had its second reading in the House of Lords on 21 February 2017. Commentary on the Bill includes that of former England and Wales Court of Appeal judge Stephen Sedley at (2 March 2017) 39(5) LRB 26–27.

The Prime Minister, Theresa May, has set a deadline of 31 March for invoking Article 50 of the Lisbon Treaty, getting official talks with the EU started. The Prime Minister reportedly watched in person some of the debate on the Bill in the Lords.

New Zealand: earthquakes (unlike fires, and other acts of God)



In New Zealand, a major earthquake sequence started early on 14 November 2016, with a magnitude 7.8 earthquake 15 km north-east of Culverden in the South Island.

The sequence resulted in the speedy development and enactment of the following 3 Bills:

- Civil Defence Emergency Management Amendment Act 2016 Amendment Bill:
- Hurunui/Kaikōura Earthquakes Emergency Relief Bill:
- Hurunui/Kaikōura Earthquakes Recovery Bill.

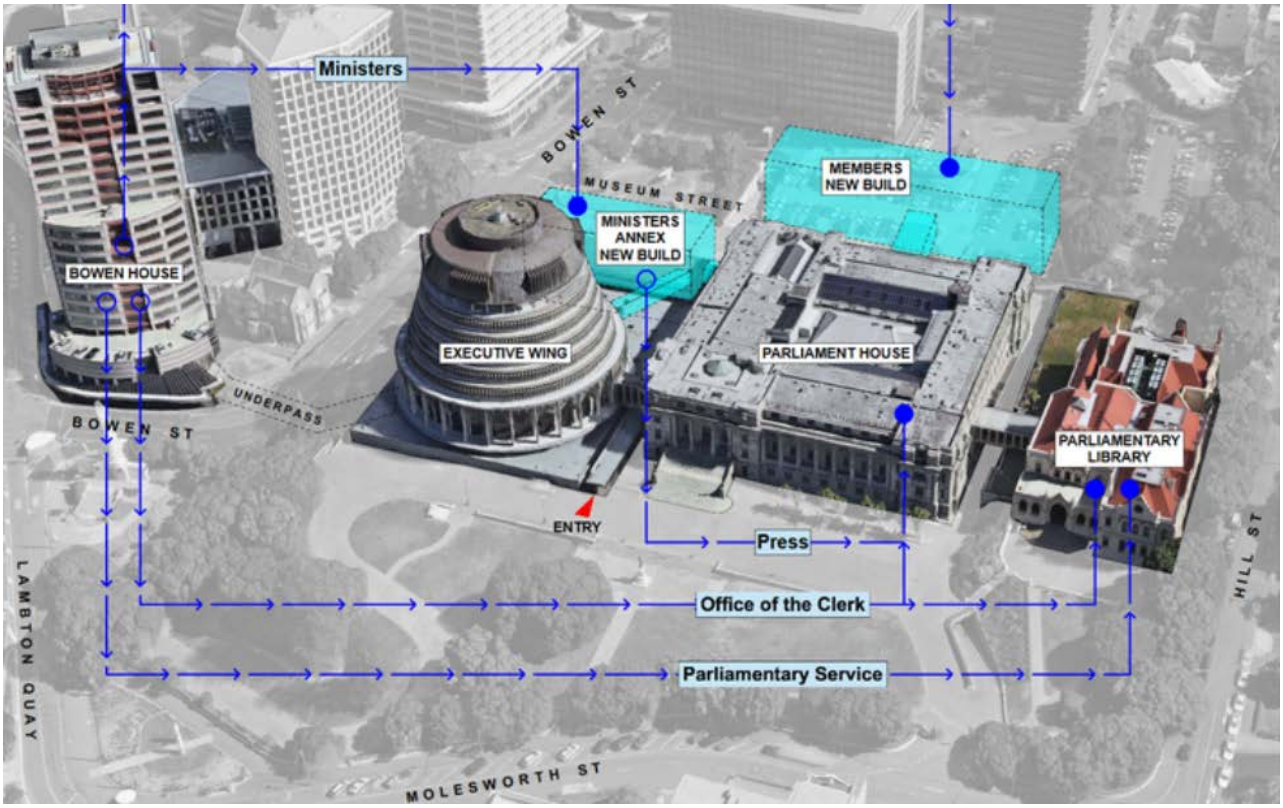
See also Regulations Review Committee *Inquiry into Parliament's legislative response to future national emergencies* (1 December 2016), and the Government response (February 2017).

The main earthquake was felt, and damaged buildings, in the Capital city, Wellington.

New Zealand PCO drafters, and many of their instructors, worked from home until office spaces were inspected and cleared as safe by engineers, and tidied and made ready for use again.

Parliament buildings were generally safe to use, and the House sat, on the following day: 15 November 2016.

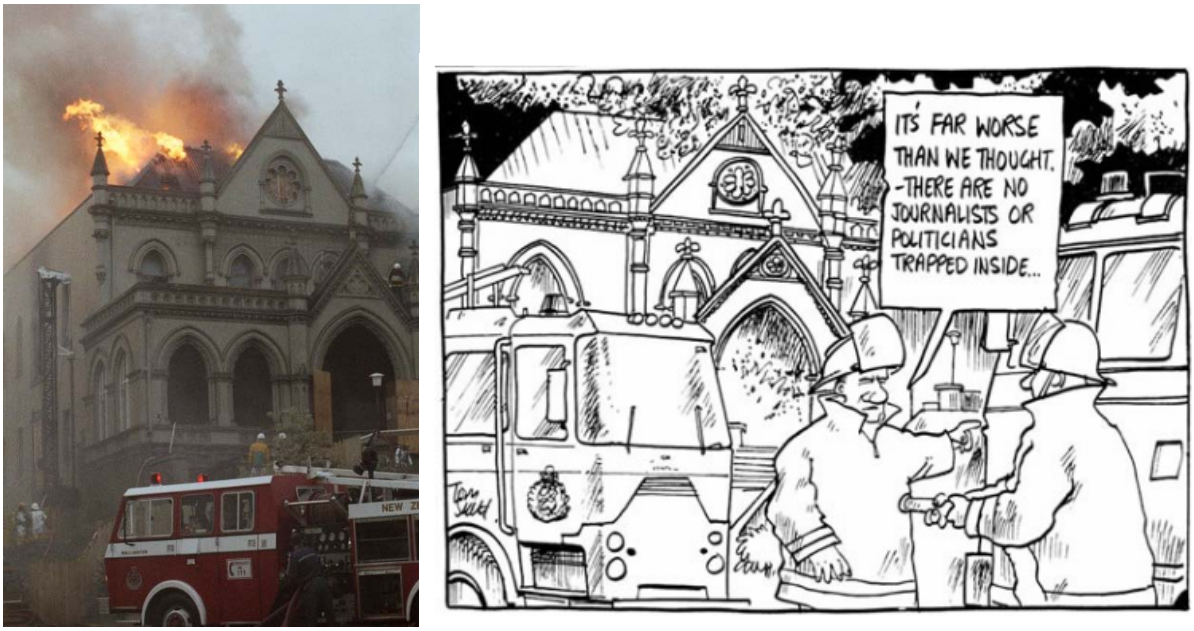
However, a quake-prone annex is to be demolished, and 2 new buildings are planned.



The earthquakes also bring to mind earlier damaging fires, at Westminster and at Wellington.

On the 1834 Westminster fire, see Caroline Shenton *The Day Parliament Burned Down* (OUP, 2012).

1907 New Zealand Parliament fire, and proposed replacement Parliament building.



1992 fire at New Zealand Parliament (during its refurbishment), and a related cartoon by Tom Scott.

On the 1907 and 1992 parliamentary fires in Wellington, New Zealand, see John E Martin—
—*The House: New Zealand's House of Representatives 1854-2004* (Dunmore Press, 2004) and
—*Parliament's Library—150 Years* (Steele Roberts, 2008).

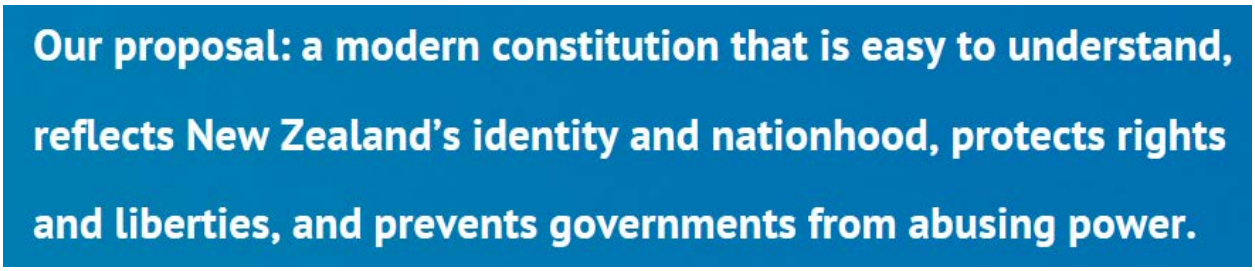
Scotland: Scottish drafters' humour – PCO Scotland drafting quiz

The Parliamentary Counsel Office in Scotland explained that it drafts in plain language, combined legislation and Christmas, and gave some "shocking examples of legislative drafting" with its Merry Christmas wishes. See its amusing "Christmas Drafting Quiz" at https://drive.google.com/file/d/0BxULMxLt8uZLTFNBeFZZWm9kRXc/view

New Zealand: new higher law Constitution proposed

Former New Zealand Prime Minister, Rt Hon Sir Geoffrey Palmer QC, and expert human rights lawyer, Dr Andrew Butler, have proposed a new Constitution for Aotearoa New Zealand.

For details of their proposal, see *A Constitution for Aotearoa New Zealand* (VUP, 2016) and the related website: http://constitutionaotearoa.org.nz/



See also Sir Geoffrey's opinion piece at http://thespinoff.co.nz/politics/20-02-2017/a-donald-trump-in-new-zealand-could-wreak-great-havoc-we-should-act-to-prevent-that-now/

Time and law drafters' role – article on 26-week qualifying period

Dr Emily Grabham is a Reader in Law at the University of Kent in the UK. Her research interests include labour law, and law and time. A recent article of hers is entitled "Time and technique: the legal lives of the 26-week qualifying period". A period of that kind is in the Flexible Working Regulations 2014 (2014 No 1398), regulation 3: "An employee who has been continuously employed for a period of at least 26 weeks is entitled to make a flexible working application."

The article draws on documentary research and interviews with policy experts, union activists and (unnamed) legislative drafters (apparently from OPC London, so you know who you are)! It focuses on the formal qualities of qualifying periods, arguing that—
—these legal technicalities conjure time and legal form as inextricable; and
—when law affects time and governance, we could usefully pay attention to the idiosyncrasies and controversies occupying legal form and legislative drafting.

The article includes this discussion of legislative drafters' role, and of substance becoming form:

"Given the diverse research into legal technicalities, it has been surprising to note a relative paucity of critical or socio-legal research on those whose job it is to 'write the law': legislative drafters. [Footnote: A new legal journal considers various technical aspects of legislative drafting: The International Journal of Legislative Drafting and Law Reform. (See also Ian McLeod *Principles of legislative and regulatory drafting* (Oxford: Hart Publishing Limited, 2009).] Working in the United Kingdom's Office of the Parliamentary Counsel, these government lawyers draft primary legislation, producing amendments as required when bills then make their way through Parliament. As such, the dogged and careful work of legislative drafters in fabricating law ends up providing not only what we understand as legal technicalities themselves, but material, also, for wider socio-legal analysis. …

"In conversations with legislative drafters, it became apparent that they believe themselves to have specific knowledge and skills, instantiating into a precise and legally effective written form the policy proposals coming from government departments… Drafters' expertise lies somewhere between translating instructions, legal innovation and a kind of legal 'weaving', producing new legislative provisions that 'align' with the fabric of what already exists… This also involves a certain 'testing' attitude, questioning instructions and departmental lawyers over the practicability of the proposed legislation. Emerging from practices of drafting is an artefact: the text and form of law as legislation, produced in conjunction with a style of writing, or

more specifically 'problem-solving', which enunciates and activates specific, pre-tested, propositions. The language used is precise and 'scientific', yet also, somehow, creative…

"Drafters pay attention to the voice of the legislation itself, aiming for what they call a 'moderate tone', which deploys brevity but not brusqueness. One drafter described it as not being 'discursive' in the sense that it should not contain what is not needed…

"The draft provision or bill must contain within itself everything it needs to subsist, unless it is defined or affected by other existing provisions either in the bill or in secondary legislation…

"Practices of problem-solving, scientific language, non-discursive writing, moderate tone and 'getting to the point' [in line with the Westminster Office of the Parliamentary Counsel (OPC) *Drafting Guidance* (August 2015)] structure much of the daily work of legislative drafters and indicate concern for the reader, whoever the reader may be.

"As regulations are drafted within the relevant government department, and not by legislative drafters in the OPC, interviews with lawyers in the Department for Business, Innovation and Skills and the Department for Work and Pensions could provide more insight here as to how 26 weeks first became the measure of the qualifying period, and why it has been used since. In the following section, however, we see that because of a felt need for qualifying periods to 'mesh', substantive deliberations about the length of these periods in any case often get lost alongside arguments about formal consistency, about the need to replicate time periods across legislative fields. Untangling what is substantively intended from what is formally replicated about these qualifying periods, then, becomes quite difficult and contributes to the need to understand form on its own terms.

"In the case of the 26-week qualifying period, it is possible that weeks have been used instead of months in order to avoid the corresponding date rule [*Dodds v Walker* (1981) 1 WLR 1027(HL); [1981] 2 All ER 609 (HL).]...[This] is at least partly an effort to render the measurement of the time period easier and less variable for readers through a pragmatic assumption that weeks are more standard than months.":

Emily Grabham (2016) 45 Economy and Society 379–406:
http://www.tandfonline.com/doi/full/10.1080/03085147.2016.1257257

Editor: *See also* the New Zealand PCO Interpretation Act 1999: A discussion paper (2013) discussion of "time described in months", of related case law (eg, *Police v Maindonald* [1971] NZLR 417 (SC) ("a calendar month ends at midnight on the day in the ensuing month immediately preceding the day numerically corresponding to the commencing day"), and of the following provisions about months:

- Acts Interpretation Act 1901 (Aust) s 2G:
- Interpretation Act, RSC 1985 (Can) s 28:
- Interpretation Act 1984 (WA) s 62.

New Zealand: Prospective overruling – more on Marino v R *– Sentence calculation – deductions for pre-sentence detention*

As the November 2016 edition noted, on 22 September 2016, the New Zealand Supreme Court gave judgment on appeals relating to sentence calculation and, in particular, on credits for pre-sentence detention: *Booth v R and Marino v The Chief Executive of the Department of Corrections* [2016] NZSC 127. The Supreme Court held unanimously that the Parole Act 2002 has been misinterpreted and as a result, in some instances – including those involving the appellants – parole and release dates have been calculated on an inappropriate basis. Justice Young's decision at [117] refers to "eliminating all anomalies from…the pre-sentence detention regime which I consider warrants legislative reconsideration".

The Supreme Court's decision, which differs from the earlier holdings on the matter of lower courts, affects the lawfulness of the detention of many prisoners over many years. The tort of false imprisonment occurs when there is no longer any lawful authority to detain someone, and good faith, lack of fault, or both on the part of the detainer is irrelevant. Liability in tort for false imprisonment is what is termed strict.

In a related later proceeding, the Chief Executive of the Department of Corrections asked the High Court to hold that the Supreme Court's judgment takes effect prospectively only, that is, only from the day it was issued (22 September 2016): *Marino v Chief Executive of the Department of Corrections* [2016] NZHC 3074. The Chief Executive argued that the prisoners were not detained unlawfully as their calculations were correctly done in line with the law as the Court of Appeal had declared it to be. It was argued that, although the Supreme Court later said the Court of Appeal authority (*Taylor*) was wrong, that should not create retrospective unlawfulness resulting in liability for false imprisonment. The effect argued for would be that no liability for false imprisonment would arise as a result of the Supreme Court case unless a mistake was made in applying the rules of either case at their respective times. The argument was also based on the Supreme Court judgment of the majority (who did not expressly declare the detention to be unlawful) differing from that of William Young J (who said at [118]: "I would also grant a declaration that Mr Marino was entitled to be released on 12 January 2016 but I accept that this is the practical effect of the majority judgment.").

Rejecting the Chief Executive's argument, His Honour Justice Simon France said at [6]–[24]:

[6] This may read as a sensible enough proposition, but in legal terms it would represent something that has not previously been done in New Zealand. It would be to say that the effect of a judgment overturning a previous case is "prospective" only. Further, that decisions made in reliance on the earlier case remain correct even though the case itself was wrong. Such an analysis would be contrary to how our law has traditionally operated.

[7] The traditional approach can be explained by reference to the interpretation of statutes. [FN: It applies to all decisions of courts that have precedent effect.] The Parole Act 2002 came into force on 30 June 2002. Let us suppose that the words of the statute have not changed since then. The effect of the Chief Executive's submission, if accepted, would be to say that until 22 September 2016 the words meant one thing, and then after that, despite the words not changing and despite Parliament doing nothing, the words changed their meaning to something completely different.

[8] The oddity involved in this is one reason why the traditional theory, called the declaratory theory of the law, has approached the matter differently. Under the declaratory theory all the Supreme Court has done is finally clarify what the words of the statute *always* meant. Cases along the way may have reached other interpretations, but they were not final and are now to be seen as incorrect.

[9] There is emerging authority to say that it is possible for a Court to rule that, contrary to the declaratory theory, the effect of its judgment is limited to the future. The possibility of a Court doing this has been recognised in—

—New Zealand [FN: *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7. The judgment of Tipping J reviews some of the authorities from other jurisdictions, at [134]–[138]. In the area of sentencing guidelines, where decisions are constrained by specific rules about retrospectivity, the new guidelines take effect from the date of the judgment (*R v Taueki* [2005] 3 NZLR 372 at [60]) or a set date (*R v AM* [2010] NZCA 114; [2010] 2 NZLR 750 at [125]).],

—the United Kingdom [FN: *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 19 (HL); *Re Spectrum Plus Limited (In Liquidation)* [2005] UKHL 41, [2005] 2 AC 680.],

—Canada [FN: *Re Manitoba Language Rights* [1985] 1 SCR 721; *R v Brydges* [1990] 1 SCR 190],

—Singapore [FN: *Public Prosecutor v Hue An Li* [2014] SGHC 171, [2015] 1 LRC 540.], and

—India [FN: *Golaknath v State of Punjab* [1967] 2 SCR 762.].

The High Court of Australia has rejected the idea[FN: *Ha v New South Wales* (1997) 189 CLR 465 at 503–504.].[Editor: The Hong Kong Special Administrative Region Court of Appeal in *Hong Kong Special Administrative Region v Hung Chan Wa* (CACC 411/2003, 26 January 2006) doubted the existence of, but also would not have exercised, any suspensive power. The Hong Kong Special Administrative Region Court of Final Appeal agreed: (FACC No 1 of 2006, 31 August 2006).]

[10] Despite recognising it as a theoretical possibility, prospective overruling, as it is called, has not actually been done in many of these jurisdictions, and certainly not in this way in New Zealand. And therein, in my view, lies the insuperable hurdle for the Chief Executive. His argument must be that in its decision on the Parole Act 2002, the Supreme Court either:

(a) made a prospective only decision of this type for the first time in New Zealand and never commented on the fact it was doing so, nor confirmed such a thing was possible, nor

identified the relevant criteria, nor explained why it was taking that step in this case; or alternatively

(b) intended the normal rule of retrospectivity (the declaratory theory) to not automatically apply. Instead, prospectivity was left to be decided initially by a first instance trial court (either the District or High Court for this level of claim). Again, the Supreme Court has not said in its judgment that it was intending the normal rule not to automatically apply, so it must be a matter of inference.

[11] The first option is sufficiently unlikely as to not merit further comment. The latter option is the Chief Executive's main proposition, and support is taken from the history of the Supreme Court case. . . .

[14] The Chief Executive submits the decision of the majority not to declare the detention unlawful leaves open the "prospective only" proposition. It is correctly noted that the detention must be unlawful if the normal declaratory theory of retrospective effect applies, and so he submits that there must be a reason why the declaration was withheld. The possibility of prospective effect only is said to be that reason.

[15] For numerous reasons I do not accept this proposition. The starting point remains that already identified: holding a judgment of this type to be of prospective effect only would be a significant milestone in New Zealand legal history. Further, every authority that recognises the power of a court to do this, immediately observes how it will require an exceptional set of circumstances for it to be the appropriate approach.

[16] . . . if the Supreme Court intended the retrospective/prospective effect of its judgment to be at large, and to be determined in subsequent proceedings initially in a trial court, it would have said so… What the Chief Executive contends for is not really interpreting the Supreme Court judgment but adding a gloss to it, namely that for some reason the normal declaratory theory does not apply….

[17] . . . The only real discussion of prospective over-ruling that has occurred in New Zealand is contained in the judgment of Tipping J in *Lai* and his Honour clearly contemplates it is a power belonging to final courts. [FN: At [139] and [142] Tipping J refers to "this Court". The issue is not without complexity. It would first need to be clarified if the power is limited to prospective overruling. If so, and if the power is limited to the Supreme Court, a procedural route for getting the matter to the Supreme Court would need to be devised.] I consider it unlikely the Supreme Court, if it intended the approach for which the Chief Executive advocates, would not at least confirm for the lower court its power to so act.

[18] Third, and again related, there is no guidance provided by the Supreme Court as to the relevant criteria the lower court should consider. And fourth, and really to sum up all these, it seems unlikely that the Supreme Court would invite courts lower in the hierarchy to determine whether a Supreme Court judgment should be only of prospective effect, rather than for that Court to do that itself.

[19] I consider that if the Chief Executive wanted the Supreme Court judgment to have prospective effect only, it was incumbent on him to ask the Supreme Court to take that step and not raise it for the first time in subsequent civil proceedings. . . .

[20] Because of the view I take it is not necessary for me to address in detail the substantive issue of whether this would be the correct case for prospective effect. The main driver for the Chief Executive's submission appears to be the perceived unfairness of it all. This is because the Chief Executive was obligated to follow the law as laid down in Taylor's case, and is not at fault.

[21] There are several responses to this. First, the perceived unfairness is not unique. It is the direct consequence of the declaratory theory and applies whenever decisions of precedent value are overruled. Second, it is wrong to treat the matter as if the Chief Executive were a private individual. It is the State which aggregates to itself the power to keep people in jail, and properly recognises it must have lawful authority to do so. The right not to have one's liberty removed other than with lawful authority is a key plank of our society, and one of its most important and fundamental rules. The value attached to the writ of habeas corpus which requires immediate release reflects this. False imprisonment is a tort of strict liability for good reason.

[22] Finally, as always, fairness is a matter of perception. Being incorrectly locked up for 127 days may equally seem unfair to the prisoner. In this case that has occurred without fault on the part of Mr Marino, and without him being able to prevent it. It happened because successive courts (as has now been held) misinterpreted the Act. That incorrect interpretation was promoted by the Chief Executive as being correct in the *Taylor* case. Mr Marino could rightly contend it is unfair for the State to incorrectly detain him for more than four months longer than his sentence authorised, and not be compensated.

[23] The United Kingdom case of *R v Governor of Brockhill Prison, ex parte Evans* involved the same situation as here. That case was one of the first times prospective overruling was raised in the United Kingdom. But the Court considered the circumstances – liberty of the subject – an inappropriate context for prospective overruling. Lord Hope of Craighead's observations [[2001] 2 AC 19 (HL) at 37] seem an appropriate point on which to conclude the present analysis:

> … it is difficult to see how the court's order could be understood as having any application to the respondent's case other than that it was to be applied to her retrospectively. *If ever there was a case where the declaratory theory should be applied it must surely be one where the liberty of the subject is in issue* – as it plainly is where the point relates to the entitlement of the subject to be released from custody. (emphasis added)

[24] This case came forward by way of a summary judgment application by the two applicants. It is limited to liability (not quantum) and to the claim for false imprisonment. The Chief Executive accepts as regards liability his only argument is that the detentions were lawful. I consider that argument is foreclosed by the Supreme Court decision and the applicants are entitled to the order sought.

See also the Human Rights Act 1993 (NZ), s 92O(2)(d)–(e), discussed in *Spencer v Attorney-General* [2014]2 NZLR 780 (HC) (s 92O(2)(d) held *not* to authorise HRRT to make an order staying the declaration it had already issued, and to backdate that order), and *Cadder v HM Advocate* [2010] 1 WLR 2601 (SC) at [56]–[62] per Lord Hope and [98]–[103] per Lord Rodger (Scotland Act 1998 (UK), s 102(2) empowered the court to limit the retrospective effect of a decision that an Act of the Scottish Parliament was beyond its legislative competence, but the Act conferred no similar power on the court to limit the effect of a decision that an act of the Lord Advocate exceeded her powers. Even so, the retrospective effect of a judicial decision was excluded from cases that had been finally determined — convictions could not be reopened).

CALC Conference in Melbourne

Beginning with the End in Mind — Legislative Drafting in the context of 21st Century challenges

29 to 31 March 2017

1 CALC will hold its next bi-annual conference in Melbourne in Australia.

2 The conference will be focussed on the challenges that face drafters and others involved in the production of legislation in the 21st Century. This is a broad and fascinating area and the conference will provide the opportunity to examine many aspects of this in depth.

3 The conference will cover 3 full days in an attempt to provide sufficient time to examine the theme.

4 The main conference will commence on the morning of Wednesday 29 March 2017 and conclude with a dinner on Friday 31 March. There will also be a workshop in Sydney on Tuesday 4 April.

5 The conference is open to all CALC members and will also include a General Meeting of CALC and the election of the CALC Council. This will be held on the afternoon of Thursday 30 March.

Registration

6 Registrations have now closed. We have over 200 delegates registered for Melbourne and over 100 for Sydney.

7 If you have registered for the conference but not heard anything from us, please contact us urgently at calc@opc.gov.au.

Sponsors

8 This conference is being sponsored by LexisNexis, Irosoft, and Leidos. We thank them for their generous support.

Further information

9 There are 2 documents containing further information about the conference.

10 The first is the general conference information which is available at http://calc.ngo/conferences.

11 The second is more detailed information for delegates which is available at http://calc.ngo/members/papers/melbourne,-march-2017. As this is in the Members' Area, you will need to be logged in to access the page.

Conference program

12 An outstanding array of speakers from across the Commonwealth have agreed to present papers at the Conference.

13 The program for the Conference and for the Workshop are available at http://calc.ngo/conferences.

Social activities

14 Two informal social activities on the Saturday have been organised by staff from the Office of the Chief Parliamentary Counsel of Victoria including a bus tour.

15 Further information is available in the information for delegates which is available at http://calc.ngo/members/papers/melbourne,-march-2017. As this is in the Members' Area, you will need to be logged in to access the page.

Visas

16 Delegates will need to ensure that they have the appropriate visas.

17 A website that will help you with this is: https://www.border.gov.au/ (Click on Visas and then enter your information in the electronic form. It should show you the visa or travel authority that you will need.)

18 Any delegates who require a letter from CALC stating that they are attending the conference should send a request to calc@opc.gov.au.

Further information about the conference

19 Some of the further information about the conference (e.g. advance copies of papers and information about the social events) will be included in the part of the calc.ngo website that you need to logon to get access to. Therefore, please make sure that you have logged on and set your password on the website.

Membership

New CALC members

The following have been recorded as members of CALC since the publication of the last CALC *Newsletter* in November 2016, and as at 24 February 2017.

Name	Country
Gcinaphi Phumel	Swaziland
Bronwyn Leslie	Australia (ACT)
Mike Reddy	Canada
Selai Nasiga	Fiji
Wendy Ho	Hong Kong (HKSAR of China)
Yun Lam Vincent Wai	Hong Kong (HKSAR of China)
Sophone Otieno	Kenya
Emmanuel Samson	Lesotho
Una Jagose QC	New Zealand
Jonathan Robinson	New Zealand
Ann Matalasi	Western Samoa
Luke Hilton	New Zealand
Kamana Stanley	Tanzania
Carl Godfrey	Australia (Commonwealth)
Sylvia Grobtuch	Australia
Allyson Veska	Australia (Tasmania)
Linny Aaron	Botswana
Janet Drysdale	Canada (Saskatchewan)
Katherine Hartshorne	Canada (Alberta)
François Ouellette	Canada
Sabrina Vigneux	Canada
Donncha Ó Conmhuí	Ireland
Judy Ndegwa	Kenya
Mzila Zwelibusa	Swaziland
Karen Duncan	Saint Vincent and the Grenadines
Ranjana Sharma	Australia
Julie Dixon	Australia

Name	Country
April Eisner	Australia (New South Wales)
Catherine Gray	Australia (New South Wales)
Eva Huehne	Australia
Claire Morgan	Australia (New South Wales)
Daniel Nolan	Australia
Danny O'Hagan	Australia
Robert Olding	Australia
Kristy Tyrie	Australia
Elena Borisova	Cyprus
Jeremiah Nyegenye	Kenya
Saidu Abba	Nigeria
Saleh Abubakar	Nigeria
Daniel Adem	Nigeria
Ben-Stowe Olubusola	Nigeria
Olubusola Osinu	Nigeria
Omolara Danmole	Nigeria
Yoyo Gom	Nigeria
Adeyinka Onitiri	Nigeria
Uduak Robert	Nigeria
Syed Mohsin Mas	Pakistan
Usman Ghazi	Pakistan
Muhammad Khashihir	Pakistan
Marleen Akop	Papua New Guinea
Lina Kegana Rouaia	Papua New Guinea
Iffah Izzati Abd Hafiz	Singapore
Anna Kanyago	Uganda
Sirri Caroline	Cameroon
Allison R Lachance	Canada
Abayomi Oyedeji	Nigeria
Liz Walsh	United Kingdom (Jersey)
Calisto Nhamboteh	Zambia
Christine Bowen	British Virgin Islands
Omphile Sello	Botswana
Awo French	Ghana
Marie-Louise Francis	Antigua and Barbuda
Ainslie Corridon	Australia (Northern Territory)
Isobel Roper	Australia (Northern Territory)

Name	Country
Khairon Niza	Malaysia
Ntombi Mnyikiso	South Africa
Phionah Asiimwe	Uganda
Angela Matthews	United Kingdom (Northern Ireland)
Ronan McClean	United Kingdom (Northern Ireland)
Udara Jayawardana	Sri Lanka
Christell Brodrick	United Kingdom (Saint Helena)
Christine Kufuor	Ghana
Folajimi Jejelola	Nigeria
St John Costello	United Kingdom
Holly Smart	Australia (Victoria)
Oladiop Ibironke-Duyile	Nigeria

Secretary Contact Details

To contact CALC's Secretary, Ross Carter, about membership or any other CALC matters (for example, to suggest or send items for this *CALC Newsletter*), email: ross.carter@pco.govt.nz

NEW LEGISLATION. Much Needed Legislation.

REFORMATIVE LEGISLATION. ADVANCED LEGISLATION.

(Old New Zealand newspaper headlines — courtesy of Papers Past)